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ON-STRUCTURE, DEEP STRATIGRAPHIC TEST WELLS*

M–36922

October 29, 1980

1. Outer Continental Shelf Lands Act: Geological and Geophysical Exploration

A deep stratigraphic test, whether drilled on or off a structure believed to hold oil or gas, is a kind of geological exploration. Therefore, the Secretary has the authority to allow prelease on-structure tests under sec. 11 of the Outer Continental Shelf Lands Act.

To: Secretary
From: Solicitor
Subject: On-Structure, Deep Stratigraphic Test Wells

You have asked me to interpret your authority under sec. 11 of the Outer Continental Shelf Lands Act, as amended. Specifically, you ask whether you may allow permittees to drill a deep stratigraphic test well on a structure before it is leased. As this office has said in the past, you may.

Background

Exxon Co., U.S.A., and the American Petroleum Institute (API) have filed petitions arguing that you lack this authority. Their arguments travel the same path.

They look to the language of the original sec. 11:

> Any agency of the United States and any person authorized by the Secretary may conduct geological and geophysical explorations in the Outer Continental Shelf, which do not interfere with or endanger actual operations under any lease maintained or granted pursuant to this Act, and which are not unduly harmful to aquatic life in such area. [43 U.S.C. § 1340(a)(1).]

The petitioners say that an on-structure, deep stratigraphic test well is not a geological exploration. They support their view by quoting four definitions from the Williams and Meyers *Manual of Oil and Gas Terms* (4th ed. 1976): "geophysical surveys," "exploration," "geological surveys," and "exploratory well." The key to their argument, however, lies in the distinction between the latter two terms. Geological surveys and exploratory wells both include drilling, but surveys drill only to gather information about the rock strata. Exploratory wells, on the other hand, are drilled "for the purpose of ascertaining the presence underground of a commercial petroleum deposit." The petitioners conclude that on-structure test wells are always drilled for the purpose of discovering oil and gas. Therefore, a test well is not a geological exploration.

The petitioners did not quote the Williams and Meyers definition of "stratigraphic test."

Analysis

The Department's authority comes from 43 U.S.C. § 1340(a)(1), the original sec. 11 of the Outer Continental Shelf Lands Act of 1953. The petitioners correctly look to the original statute to see whether the Secretary has the necessary authority, but then they re-

*Not in chronological order

sort selectively to a glossary to support their view. Academicians and legislators often speak different languages, and the language of the Congress is generally better interpreted by its committee reports than by specialized manuals. Judge Learned Hand said it best:

> [It is] one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning. *Cabell* v. *Markham*, 148 F. 2d 737, 739 (2d Cir. 1945).

We must first look to the legislative history of the 1953 Act to see what Congress intended the term "geological and geophysical explorations" to encompass.

The Outer Continental Shelf Lands Act of 1953 originated as H.R. 5134. That bill, as introduced on May 12, 1953, proposed to add several new sections to the Submerged Lands Act, May 22, 1953, 67 Stat. 29 (1953). Proposed new § 17 restricted in one respect the rights granted to lessees under an OCS lease:

> Geological and Geophysical Explorations—The right of any person, subject to applicable provisions of law, and of any agency of the United States to conduct geological and geophysical explorations in the outer continental shelf, which do not interfere with or endanger actual operations under any lease issued pursuant to this Act, is hereby recognized. 99 Cong. Rec. 4893 (1953).

At about the same time S. 1901 was introduced in the Senate. 99 Cong. Rec. 4908 (1953). The May 14 version of S. 1901 said nothing about exploration. The Department of Justice, in a letter dated May 26, called this omission to the Senate's attention and suggested that exploration "might well be conditioned on securing a permit from the Secretary." S. Rep. No. 411, 83rd Cong., 1st Sess. 39 (1953). The Senate followed this suggestion and drafted a new § 11 to its bill, using the language that ultimately was enacted. Sec. 11 added two items to the House's § 17: the permit requirement (implicit in the word "authorized") and the requirement that exploration must not be unduly harmful to aquatic life in the area explored. S. Rep. 411, 83rd Cong., 1st Sess. 14 (1953). Although the Senate abandoned S. 1901, it retained most of its provisions as Senate amendments to H.R. 5134. The Conference Report followed the Senate's version. See H. Rep. 1031, 83rd Cong., 1st Sess. (1953).

My reading has revealed nothing to suggest that Congress intended to narrow the meaning of "geological and geophysical explorations." Given the Congressional purpose to reserve the right to explore to any authorized explorer, courts will favor a broad interpretation of the phrase. The question, then, is whether deep stratigraphic test drilling is a form of geological or geophysical exploration. Because the meaning of stratigraphic test drilling was clarified only within the last twenty to thirty years, a brief review of its evolution is in order.

The interest of the oil and gas industry in stratigraphic drilling did not become significant until the 1950's. Before that time, explorers searched underground primarily for abnormal features called "structural traps." These traps, most commonly occurring on salt domes, anticlines, and faults, are disruptions in the earth's strata, caused by forces deep in the earth. These forces have distorted, fractured, and displaced the layers of rock comprising the earth's crust, bringing impermeable rock and permeable rock to rest together. As oil and gas passing through the permeable rock reach the impermeable rock, they begin to accumulate. They are trapped within the permeable strata by the impermeable strata. Explorers searched for these traps (as they do today) with a variety of geological and geophysical techniques, including several kinds of well logs, and seismic, magnetic, and gravity surveys.

But the more these structural traps were explored and developed, the less chance there was to find additional commercial quantities of oil in other structural traps in the future. The number of these traps is finite: so, obviously, as each new one was found, the number of traps remaining to be found decreased. Consequently, explorers realized that they needed to exploit a different kind of trap: the "stratigraphic trap." Stratigraphic and structural traps confine oil and gas in much the same way, but they are created differently. Structural traps, to repeat, are caused by bends, folds, or breaks in the layers of rock underground. Stratigraphic traps are created by changes in the texture of the rock within unbroken layers. The extent to which oil and gas move, or "migrate," underground depends upon how porous and permeable the rock is. Oil and gas moving through porous and permeable rock become trapped when the rock's texture turns non-porous and impermeable. The difference between structural and non-structural traps was important to the oil and gas industry in the 1950's, because existing exploration techniques were not adequate to detect traps created by these changes in texture (or stratigraphy, to use the broader and more scientific term). See Smith, "Stratigraphic Drilling in the Rocky Mountain Area," 17 Oil and Gas Compact Bull. 48, 49 (June, 1958). As a consequence, geologists and geophysicists began to turn to the stratigraphic test to gather the data they needed.

Three articles in the 1958 *Oil and Gas Compact Bulletin* show that, while a precise definition of stratigraphic test drilling lacked universal acceptance, industry agreed on some of the elements of a definition. The first article, by an oil company geophysicist, described a stratigraphic test well as "a hole in the earth for purposes of obtaining information [on] structure, lithology, porosity, and permeability." Smith, above, at 49. The article added that the well should be drilled into potential reservoirs of oil and gas, but nevertheless distinguished between

stratigraphic wells and "wildcat" wells:

> A definite drilling program must be designed to isolate the area where a wildcat may be drilled for stratigraphic oil accumulation. In order to do this, the [stratigraphic] test holes must penetrate the prospective oil-or-gas bearing formation. *Id.* at 50.

The second article, by an oil company geologist, admitted that "the term 'Stratigraphic Test' is difficult to define;" but though the author was struggling with his terminology, he basically agreed with the elements described in the first article. Stratigraphic wells and wildcat wells were different:

> [A] strat hole is a hole drilled to obtain lithologic information on units in the subsurface. These data were used * * * to further our geological knowledge, with the end product, of course, the drilling of successful wildcat wells in prospects thus delineated. * * * [I]f a hole has an average chance to produce, and would be completed as a producing well if it was indicated to be a discovery, it is then a wildcat rather than a core hole or a well drilled purely for information. Hart, "Value of Stratigraphic Tests," 17 *Oil and Gas Compact Bulletin* 53 (June, 1958).

But the expense of drilling kept the author from sticking to his definitions. He believed that it was sometimes appropriate to convert a stratigraphic well into a wildcat well (by increasing the size of the hole and completing it for production) if oil were found. "To plug and abandon a hole and redrill in the immediate vicinity is obviously waste." *Id.* at 54. Nevertheless, "strat or core hole programs are designed to obtain information much as are geophysics, surface geology, air photos or any other exploration programs, not as a means of disguising a wildcat." *Id.* The difference between stratigraphic and core holes is that the stratigraphic hole is drilled into "potentially productive horizons" for data on porosity, permeability, lithology; core holes, on the other hand, "are primarily drilled for structural data." *Id.* at 53.

The most important article was the third. It was the report of the Interstate Oil Compact Commission's Committee on Regulatory Practices for Stratigraphic Test Holes. The Committee reported on problems created by the vagueness of state regulations on stratigraphic drilling, with the purpose of drafting model regulations for the states to adopt. Consequently, the Committee considered the variety of meanings of stratigraphic drilling both in the industry and in state regulations. One of the products of this work was a set of standardized definitions:

> *Structure test*—Hole drilled for geologic structure alone, although other types of information may be acquired during the drilling. This type of hole is drilled to a structural datum which is normally short of the known or expected producing zone or zones.
>
> * * * * *
>
> *Stratigraphic test*—Hole drilled for stratigraphic information, including lithology (facies), porosity and permeability. It is drilled to penetrate a potentially productive zone, and thus may result in production.

17 *Oil and Gas Compact Bull.* 43 (Dec. 1958).

These two definitions are used by Williams and Meyers in their *Manual of Oil and Gas Terms* 571, 574 (4th ed. 1976), the book on which the petitioners rely.

This review of the development of the definition of stratigraphic test drilling shows that for many years there has been widespread agreement upon four points. First, a stratigraphic test is an accepted form of geological exploration. Second, its purpose is to gather geological information on the stratigraphy of an area believed capable of holding commercially valuable accumulations of oil or gas. Third, a stratigraphic test is most effective when it is drilled into this area. Fourth, direct evidence of the presence of oil or gas (called a "hydrocarbon show") is the most reliable form of geological information on the presence of oil or gas.

The petitioners try to support their view by invoking the terms of the OCS lease. The lease grants an exclusive right "to drill for, develop and produce oil and gas." They say that if the Secretary may allow prelease, on-structure test wells under § 11, he may also allow explorers to drill these tests on another company's lease. This, they say, would deny lessees the exclusive right to drill for oil and gas.

Sec. 11 itself does not stop the Secretary from allowing on-structure tests on tracts already leased. Whether the language of the lease would prevent this and whether the Secretary has the authority to issue such a lease provision are questions beyond the scope of this opinion.

Conclusion

Deep stratigraphic tests, on or off structures potentially holding oil or gas, are geological explorations within the meaning of 43 U.S.C. § 1340.

CLYDE O. MARTZ
Solicitor

GRAFTON COAL CO., INC.

2 IBSMA 316

Decided *November 4, 1980*

Appeal by the Office of Surface Mining Reclamation and Enforcement from an Apr. 23, 1980, decision of Administrative Law Judge Tom M. Allen in Docket No. CH 0-165-R, vacating Notice of Violation No. 80-I-37-5 and Cessation Order No. 80-I-37-2, issued to Grafton Coal Co., Inc., for an alleged failure to eliminate a highwall in violation of 30 CFR 715.14.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally—Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Specificity

Under the circumstances of this case, it was error for the Administrative Law Judge to vacate a notice of violation on his own motion on the grounds that it lacked reasonable specificity as required by sec. 521(a)(5) of the Act when the parties expressed no confusion about the nature of the alleged violation.

2. Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Generally—Surface Mining Control and Reclamation Act of 1977: Evidence: Generally—Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

Under the circumstances of this case, sufficient evidence was presented to show that unforeseen circumstances arose during regrading, that the state regulatory authority approved a change to the permit under its established procedures, and that the change was carried out in accordance with the requirements of 30 CFR 715.14(b).

3. Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

Because OSM is entitled to rely on the permit package as evidence of the conditions under which mining and reclamation have been approved, the failure of a state regulatory authority to require written documentation of approved permit changes to be placed in the permit package exposes a permittee to potential liability under the Act.

APPEARANCES: Harold Chambers, Esq., Office of the Field Solicitor, Charleston, West Virginia, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; James Rodney Christie, Esq., Clarksburg, West Virginia, for Grafton Coal Co., Inc.; Homer A. Speaker, Esq., Assistant Attorney General, Charleston, West Virginia, for amicus curiae the State of West Virginia.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) filed for review of a decision of the Hearings Division vacating Notice of Violation No. 80–I–37–5 and Cessation Order No. 80–I–37–2 for failure to abate the violation listed in the notice. The notice and order were issued to Grafton Coal Co., Inc. (Grafton), for an alleged failure to eliminate a highwall in violation of 30 CFR 715.14. This action was taken pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act).[1] For the reasons discussed below, we affirm the decision as modified.

Background

On Jan. 28, 1980, OSM inspected Grafton's Radabaugh surface mine in Lewis County, West Virginia. Mining and reclamation had been completed and no one was present at the site. OSM issued Grafton Notice of Violation No. 80–I–37–5 on Jan. 31, 1980, for "failure to eliminate highwall" in violation of 30 CFR 715.14 and required the company to "eliminate highwall" on the "area where highwall has not been eliminated" by 8 a.m. on Feb. 29, 1980. Grafton filed an application for review of this notice on Mar. 3, 1980. After a follow-up

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. II 1978).

inspection conducted on Mar. 25, 1980, OSM issued Grafton Cessation Order No. 80–I–37–2 for failure to abate the violation listed in the notice. On Apr. 10, 1980, Grafton filed a petition for temporary relief from the imposition of the $750 per day minimum penalty required by sec. 518(h) of the Act, 30 U.S.C. § 1268(h) (Supp. II 1978). A hearing on the petition was held on Apr. 15, 1980.

At the hearing,[2] the OSM inspectors testified that they issued the notice because they believed that about 200 feet of a terrace at the top of the 3,000-foot long backfill on this site was original highwall (Tr. 41–42, 44, 48, 70). Under 30 CFR 715.14 (b)(2)(iii), highwalls may not be left as part of a terrace (Tr. 20, 86). Grafton's engineer visited the site after the notice was issued (Tr. 9–10), but was unable to say whether all of the original highwall was eliminated before the terrace was constructed (Tr. 16). The State inspector who visited the site periodically during the mining process testified for Grafton that the highwall was completely eliminated and the terrace was cut into the backfill material (Tr. 29–30).

The permit for this site was issued in June 1978 (Tr. 14). It did not provide for a terrace (Tr. 11). The terrace was a drainage control measure planned during the regrading process (Tr. 11) and approved by the State inspector in the field. According to the inspector, the final plan was acceptable to the State (Tr. 21, 24, 27, 34). Grafton had been issued a grading release and about 82 percent of the bond had been returned (Tr. 13, 24).

At the close of the hearing, the Administrative Law Judge held that, under the Board's decision in *Old Ben Coal Co.*, 2 IBSMA 38, 87 I.D. 119 (1980), the notice of violation issued to Grafton lacked reasonable specificity as required by sec. 521(a)(5) of the Act because it did not state which areas along the terrace were original highwall and had to be reclaimed (Tr. 100–101). He also found that there was, in fact, no original highwall remaining (Tr. 101–102). He issued an order from the bench vacating the notice and, consequently, the cessation order, on those two grounds (Tr. 108).

The Apr. 23, 1980, written confirmation of the decision from the bench reiterated the two grounds for vacation (Decision at 4–5). It furthermore stated that the regulatory authority's approval of the grading, release of the bond, and verbal requirement to construct a

[2] Although this hearing was described and conducted as a temporary relief hearing, the Administrative Law Judge issued a decision on the merits at its conclusion. In *Cravat Coal Co.*, 2 IBSMA 136, 87 I.D. 308 (1980), the Board vacated that part of a decision granting permanent relief on the merits when OSM objected that it was not given notice that a final decision would be rendered at the temporary relief hearing and so had not presented its entire case. While the Board still holds that 43 CFR 4.1123 requires that the parties be given advance notice of the nature of the hearing, it declines to vacate the decision on that ground when the potentially disadvantaged party, in this case OSM, has not objected to the procedure.

terrace, "amounts to the type of approval which is contemplated by the Act but which probably should have been in writing" (Decision at 5).

OSM filed a notice of appeal of this decision on May 27, 1980. In its brief, filed on July 7, 1980, OSM argues that *Old Ben Coal Co., supra*, does not control this case and that the State regulatory authority did not properly approve the construction of a terrace on this site. Grafton filed a reply brief on Aug. 5, 1980.

On Sept. 4, 1980, the Board ordered further briefing on the authority of a West Virginia state inspector to approve permit changes. An amicus curiae brief was also requested from the State. OSM and the State responded to this order.

Discussion and Conclusions

[1] The Administrative Law Judge gave two reasons for vacating the notice and order in this case. The first ground was that the notice lacked reasonable specificity as required by sec. 521(a)(5) of the Act and *Old Ben Coal Co., supra*. Notice of Violation No. 80–I–37–5 was reasonably specific: although exact details may not have been given, the notice informed Grafton of the nature of the alleged violation. Grafton did not indicate any confusion arising from the notice. If the Administrative Law Judge had questions about the nature of the alleged violation, he could have sought clarification for himself, but it was error for him to vacate the notice on this ground on his own motion when the parties expressed no doubts about what was being charged.

The second ground given for vacation was the finding of fact that the highwall was completely eliminated before the terrace was constructed. This finding is relevant only if the construction of a terrace was properly approved by the State regulatory authority as required by 30 CFR 715.14(b)(2). The terrace was not part of the permit as originally approved. Instead, it was a change made during the regrading process in the field and orally approved by the State inspector reviewing this site. OSM argues that sec. 715.14(b)(2) and the West Virginia surface mining law require that permit modifications must receive the prior written approval of the Director of the Department of Natural Resources, the regulatory authority in West Virginia. Therefore, OSM contends that the inspector was without authority to approve the change. In its amicus curiae brief, the State indicates that it interprets its statute and regulations to permit inspectors to authorize minor regrading deviations because of unforeseen circumstances arising during regrading. These changes can apparently be made orally, although, in this case, the State says that the grading release was tantamount to written approval.

[2, 3] Sufficient evidence was presented to show that unforeseen circumstances arose during the course of regrading, necessitating a change from the permit as approved (Tr.

10), and that the State regulatory authority approved that change in accordance with its standard procedures (Tr. 29–30; Brief of West Virginia).[3] There was also sufficient evidence from which the Administrative Law Judge could conclude that the original highwall had been completely eliminated before the construction of the terrace (Tr. 29–30).[4] For these reasons, the decision below vacating the notice and order on the grounds that the highwall had been eliminated is affirmed.

Therefore, the Apr. 23, 1980, decision vacating Notice of Violation No. 80–I–37–5 and Cessation Order No. 80–I–37–2 is affirmed as modified.

MELVIN J. MIRKIN
Administrative Judge

NEWTON FRISHBERG
Administrative Judge

WILL R. IRWIN
Chief Administrative Judge

[3] This is not to suggest that the Board approves of the procedure followed by the State in this case. The permit package is intended to give notice of the conditions under which mining and reclamation have been approved. Any change from the approved permit, regardless of how minor, should simultaneously be documented in writing in the permit package, setting forth the reasons and justifications for and the nature of the change and the new conditions to be followed. Where appropriate, technical data should be presented. When such a document is not part of the permit package, OSM is justified in taking any appropriate enforcement action against the operation. Thus, the failure of the State to require documentation of changes exposes its permittees to potential liability under the Act.

[4] Even if a change is documented in th permit package, if the reasons for the change are not shown to be acceptable under the Act, or if all other required conditions of the Act are not met, a notice or order should be sustained. *Cedar Coal Co.*, 1 IBSMA 145, 86 I.D. 250 (1979).

APPLICATION OF THE ENDANGERED SPECIES ACT TO NATIVE AMERICANS WITH TREATY HUNTING AND FISHING RIGHTS

M–36926

November 4, 1980

Endangered Species Act of 1973: Generally

The Endangered Species Act of 1973, including the taking prohibitions of sec. 9, applies to Native Americans exercising treaty hunting and fishing rights.

Indians: Hunting and Fishing

Indian hunting and fishing rights, created by treaty or otherwise, do not include the right to take species which have been listed as threatened or endangered pursuant to the Endangered Species Act of 1973.

To: Assistant Secretary, Fish and Wildlife and Parks
Assistant Secretary, Indian Affairs

From: Solicitor

Subject: Application of the Endangered Species Act to Native Americans with Treaty Hunting and Fishing Rights

Introduction

This opinion addresses the question of whether the Endangered Species Act of 1973 (ESA) applies to Native Americans in their

exercise of any hunting or fishing rights pursuant to a treaty with the United States or pursuant to a statutory or aboriginal right, or an executive order. I am mindful that hunting and fishing rights of Indians have been a source of both litigation and social tension, especially during the last decade, and in this context have examined the interests of the United States in protecting endangered fish and animal species, where they may conflict with traditional hunting and fishing rights.[1]

Many Indian treaties reserve the right of hunting and fishing either on reservations or at traditional hunting or fishing locations or both. Even where an Indian reservation has been terminated by Congress, the treaty hunting and fishing rights survive termination. *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968). Such rights are exercised in a spectrum ranging from takings for religious or recreational purposes to the operation of commercial fisheries. Whether or not specific individuals have a right to exercise tribal treaty rights is a question which must be examined on a case by case basis. It depends on a number of questions such as the nature of the treaty right, the status of the individual, the nature of the taking, and any applicable conservation statutes or regulations. All of these factors must be considered in examining treaty hunting and fishing rights in specific cases.[2]

It is my opinion, based on Supreme Court analysis of Indian treaty hunting and fishing rights, that as a matter of law, Indian treaty rights do not extend to the taking of threatened or endangered species and that even if treaty rights allow the taking of endangered and threatened species, then those rights may have been abrogated or modified by Congress through the ESA. (See discussion p. 533, *infra*.)

The ESA contains one major provision, sec. 9, which is most important with respect to the Act's application to Indian hunting and fishing rights. Sec. 9 of the Act contains the prohibitions on the taking of endangered species:

> Sec. 9. (a) General.—(1) Except as provided in sections 6(g)(2) and (10) of this Act, with respect to any endangered species of fish or wildlife listed pursuant to section 4 of this Act it is unlawful for any person subject to the jurisdiction of the United States to—
>
> (A) import any such species into or export any such species from the United States;
>
> (B) take any such species within the United States or the territorial sea of the United States;
>
> (C) take any such species upon the high seas;
>
> (D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

[1] Reference to "endangered" species in this memorandum encompasses both threatened and endangered species. In large part, the prohibitions against taking endangered species are applied to threatened species as well. See 16 U.S.C. § 1533(d); 50 CFR § 17.31.

[2] Indian hunting and fishing rights can also be created by statute, executive order or agreement where they are not otherwise reserved in a specific treaty. We will refer hereinafter to rights recognized in these three fashions as "treaty" rights.

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 4 of this Act and promulgated by the Secretary pursuant to authority provided by this Act.

Given the intent and character of this statute, it is clear that but for assertions of treaty hunting and fishing rights, sec. 9 of the ESA would, without qualification, apply to all Indians.[3] Sec. 9(a) applies to "*any person* subject to the jurisdiction of the United States." (Italics added.) American Indians are clearly subject to the jurisdiction of the United States.[4]

Indian treaty rights do not include the right to take species of fish or wildlife which are threatened with extinction.

There is a rule of construction which directs that a statute and an Indian treaty must be construed in harmony, to the extent possible. *Payne* v. *United States*, 264 U.S. 446, 448 (1924). There is another rule which states that treaties are not to be construed to the detriment of the Indians, *Choctaw Nation* v. *United States*, 318 U.S. 423, 432 (1943); *Shoshone Indians* v. *United States*, 324 U.S. 335, 353 (1945), and a third rule which states that abrogation or modification of treaty rights by Congress are not to be lightly imputed. *Menominee Tribe* v. *United States*, 391 U.S. 404, 412 (1968). The question of abrogation or modification need not even arise if there is no irreconcilable conflict between a treaty and the statute. *See* Coggins, *Native American Indians and Federal Wildlife Law*, 31 Stanford L. Rev. 375 (Feb. 1979). It is my opinion that the Endangered Species Act is in complete harmony with the exercise of treaty hunting and fishing rights by Indians because those rights do not include the right to take endangered or threatened species and thus application of the Act to Indians does not restrict or abrogate their treaty rights. It is also my position that when various Indian tribes and the United States entered into treaties reserving hunting and fishing rights in the

[3] With the exception, of course, of certain Alaska Natives, Sec. 10(e), 16 U.S.C. § 1539 (e).

[4] A specific example of the kind of sec. 9 problem encountered by this Department is that which was the subject of a memorandum of Mar. 11, 1977, from the Division of Conservation and Wildlife to the Deputy Solicitor concerning the killing of a Northern Rocky Mountain Wolf on the Blackfoot Reservation in Montana, allegedly by an enrolled member of the Blackfoot Tribe. The wolf has been listed as endangered since June 4, 1973, but the confusion over the scope of the ESA in dealing with Indian treaty hunting and fishing rights has prevented effective investigation or prosecution of this case. There have also been a number of such disputes concerning the killing of eagles.

Indians, they did not even contemplate whether this right extended to the taking of a species which was on the brink of extinction.

This position was implicitly taken by the United States Supreme Court in *Washington Game Department* v. *Puyallup Tribe*, (*Puyallup II*), 414 U.S. 44, 49 (1973) where Justice Douglas, in upholding Indian treaty fishing rights, stated:

> We do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species, and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the *Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.* (Italics added)

Puyallup II was one of a number of decisions by the Supreme Court concerning a chronic dispute between a number of tribes and the State of Washington over treaty hunting and fishing rights. Those cases established that (1) the State, pursuant to its police power, has the right to regulate off-reservation fishing where the regulation is reasonable and necessary for conservation, *Puyallup Tribe* v. *Washington Game Department*, 391 U.S. 392, 398 (1968) (*Puyallup I*); (2) any regulations promulgated by the State as reasonable and necessary for conservation purposes may not discriminate against Native Americans who hold valid treaty hunting and fishing rights, *Washington Game Department* v. *Puyallup Tribe*, 414 U.S. 44, 48 (1973) (*Puyallup II*); (3) reasonable and necessary State conservation regulations may apply to Indian hunting and fishing on the reservation as well as off. *Puyallup Tribe* v. *Washington Game Department*, (*Puyallup III*), 433 U.S. 165, 171 (1977).

Puyallup I made it clear that Indian treaty rights did not foreclose state regulation for conservation purposes. This is discussed in more detail below. *Puyallup II* and *III*, however, are particularly relevant to the present issue. In *Puyallup II*, the Court, while recognizing the regulatory power of the State, held that the State could not ban all commercial fishing of salmon and steelhead since this action would deprive treaty-fishermen of a share of those fish runs taken by sports fishermen who are predominantly non-Indian. This, the Court held, was discriminatory. 414 U.S. at 48. The Court nonetheless accepted the State's prohibitory regulation approach for the purpose of conservation and only ordered apportionment of those fish whose escapement would not be necessary for the "perpetuation of the species." *Id.* Thus, an implicit holding of *Puyallup II* is that Indian treaty rights do not allow the taking of declining species where reasonable and necessary nondiscriminatory State conservation regulations prohibit such taking.

This analysis is not limited to the argument that there is regulatory

power in the State. Rather it means that treaty rights do not give treaty fishermen the right to such taking. This is made clear by Justice Douglas' express admonition in *Puyallup II*, quoted above. This finding was reemphasized in *Puyallup III* where the Court rejected the Indians' claim "to an exclusive right to take steelhead while passing through their reservation." 433 U.S. at 176. Thus, as a matter of law, Indian treaty rights do not include the right to take species which are endangered or threatened with extinction.

This principle was recently reaffirmed by the Supreme Court in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658 (1979). The issue in *Washington* was the right of the Yakima Indians to an apportioned amount of the salmon and steelhead runs in the State. In upholding that right, the Court observed that Indian treaties "secure the Indians' right to take a *share* of each run of fish that passes through tribal fishing areas." 433 U.S. at 679 (Italic added). The Indians' right to take a "share" was not viewed as a right to an uncontrolled, exclusive taking. The Court, referring to its earlier *Puyallup* decisions, rejected that proposition:

> [W]e *unequivocally rejected* the Tribes' claim to an untrammeled right to take as many of the steelhead running through their reservation as they chose. *Id.* at 684 (Italics added).

The critical point to be made here is that even though these treaties expressly reserved an equal fishing right on the part of nontreaty fishermen, that was not the basis for the Court's balancing of the Indians' treaty rights against the State's power to regulate. That balance recognized the police power of the State to conserve wildlife as an inherent State power and *not* simply a result of the State's citizens having equal fishing rights under the treaty.[5] It was the State's police power to conserve, and not the terms of the treaty, which authorized the fishing prohibition approved by the Court in *Puyallup II*, 414 U.S. at 49. Although it overturned that part of the State's program which discriminated against the treaty fishermen, the Court nevertheless recognized that treaty hunting and fishing rights simply do not allow Indians to avoid the reach of authorized, nondiscriminatory conservation prohibitions which are necessary to preserve fish and wildlife resources. Although in *Puyallup II* this prohibition was in the form of a *State* regulation, the taking prohibition was viewed by the Court as not infringing upon any Indian treaty right. This determination did not turn on the source of the sovereign's regulating authority.

[5] The treaty in *Puyallup* was one of the "Stevens" treaties entered into the Pacific Northwest which contained "in common" language, giving nontreaty fishermen equal rights to take fish off-reservation.

This conclusion is further compelled by this Department's responsibility, recently recognized by the Assistant Secretary for Indian Affairs, to preserve Indian wildlife resources for future generations of Indians. *See* Memorandum of June 18, 1980 from Assistant Secretary of Indian Affairs to the Fish and Wildlife Service.

The special responsibility of the Secretary to Indians compels regulation of Indian hunting and fishing pursuant to a treaty. This responsibility obligates the United States to take all reasonable and necessary steps to protect the hunting and fishing rights of *future* tribal members from being squandered by the "untrammeled" pursuit of endangered species by *present* tribal members. *Cf. Seminole Nation* v. *United States*, 316 U.S. 286, 297 (1942); *Eastern Band of Cherokee Indians* v. *North Carolina Wildlife Resources Commission*, 588 F. 2d 75 (4th Cir. 1978). Failure to act could be deemed a dereliction of the Secretary's special responsibilities since a treaty hunting or fishing right loses all realistic value if the game species upon which it is focused is allowed to suffer the fate of the passenger pigeon. The only practical means of protecting these resources is, of course, regulation, as the BIA has recognized in its Indian fishing regulations, *e.g.*, 25 CFR 255, 256, 258.

This analysis does not involve any abrogation of treaty rights but instead simply makes them subject to regulatory control for the purposes of the conservation of endangered or threatened species, thus insuring the perpetuation of the hunting and fishing rights of future generations of Native Americans. Any other conclusion would render the Act impotent and could seriously jeopardize the continued existence of many endangered species to the advantage of no one. It is also my opinion that since temporary control under the ESA respects and attempts to preserve the rights of future generations of Indians to hunt and fish under their respective treaties, the reasonableness and necessity of such an interpretation is readily apparent.[6] This approach ultimately preserves the rights of the Indians while at the same time addressing the critical wildlife problem recognized by Congress in the ESA. Such regulation is indispensable for the survival of these

[6] An example of the long term benefits from such regulation is the American alligator. Due to inadequate state regulatory controls, the federal government listed the alligator once faced with extinction as endangered and prohibited all further takings in 1973. As a result of these federal regulatory controls, the alligator has now made a significant recovery and has actually been taken off the endangered species list altogether in certain parts of the country. See *e.g.*, 45 F.R. 52849 (Aug. 8, 1980). Thus, through temporary restrictions on the public's ability to take American alligators, the survival of the species has been assured and the need for further taking prohibitions has been eliminated. We contend that a similar short-term restriction/long-term species enhancement equation should be held to apply to Indian hunting and fishing involving endangered or threatened species. To the extent that all secretarial actions under the ESA must be designed to facilitate the recovery of the species with a concomitant elimination of continued federal protection, we contend that the ESA's regulation of Indian hunting and fishing rights must presumptively be viewed as short term in nature and not permanent.

species and for the conservation of these species for future generations of Indians pursuant to the special responsibilities of the United States.

A related point can be made based on the perspective of the Supreme Court. The Court has repeatedly directed in the *Puyallup* cases, *supra*, as well as in *Washington* v. *Washington*, *supra*, that where legitimate wildlife conservation interests of the State are concerned, Indian treaty rights either do not exist, or can be closely regulated and controlled. On the other hand, the Court has recognized no flexibility in dealing with the mandates of the Endangered Species Act and has recognized the critical need for strict and universal application of that law's safeguards. *TVA* v. *Hill*, *supra*. If the treaty rights and ESA can be considered reconcilable, and we submit that they can, the ESA's purposes and obligations must attach rigorously to treaty as well as non-treaty users of wildlife resources. If such regulation is not applied then the United States will be precluded not only from protecting these species, but also from preserving and restoring them for future use by Indians. Both sides would be losers where reasonable and necessary regulations could have protected all interests. Failure to regulate takings would defeat the treaty rights of all parties, the intent of Congress, and the public interest.

It is also significant that the general circumstances of treaty negotiation in the nineteenth century would not have led any of the parties to even form an intention on this issue. The Supreme Court noted the need to interrupt Indian treaties to reflect the original intentions of the parties in *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978):

> These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.

The historical context of Indian treaty negotiations demonstrates that neither the United States nor the Indian signatories ever contemplated the biological and legal circumstances in which we find ourselves.

The Supreme Court, in an analysis of the nature of Indian treaty hunting and fishing rights, recognized and discussed the historical and factual background of the treaty with the Yakima Indians in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, *supra*, examining the history of the treaty and the intent of the parties:

> Because of the great abundance of fish and the limited population of the area, it simply was not contemplated that either party would interfere with the other's fishing rights. The parties ac-

> cordingly did not see the need and did not intend to regulate the taking of fish by either Indians or non-Indians, nor was future regulation foreseen.
>
> In sum, it is fair to conclude that when the treaties were negotiated, neither party realized or intended that their agreement would determine whether, and if so how, a resource that had always been thought inexhaustible would be allocated between the native Indians and the incoming settlers when it later became scarce.
>
> * * * * *
>
> Unfortunately, that resource has now become scarce, and the meaning of the Indians' treaty right to take fish has accordingly become critical.
>
> *Id.* 443 U.S. at 668, 669.

In such an historical context the parties to the treaties could not have anticipated the subsequent depletion of various species and the need to protect such species through the Endangered Species Act. In the *Washington* case, the Court dwelt on this at length in consideration exactly what the scope of the Indians "right of taking fish was." Again, in examining the parties' intent regarding the treaty, the Court stated:

> At the time the treaties were executed there was a great abundance of fish and a relative scarcity of people. No one had any doubt about the Indians' capacity to take as many fish as they might need. 443 U.S. at 675.

Under the Act, an "endangered" species is one "which is in danger of extinction throughout all or a significant portion of its range." Sec. 3(6). A "threatened" species is one "which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." Sec. 3 (20). To allow exclusive, unrestricted hunting and fishing of these species pursuant to alleged treaty rights would not only threaten these species with extinction, but would ironically eliminate the source of any rights which did exist. *Kennedy* v. *Becker*, 241 U.S. 556, 563 (1916).

The *Kennedy* Court observed that such a situation, rather than maintaining the sovereignty of the Indians, would instead deny such sovereignty to both the Indians and the State, each being "free to destroy the subject of the power." 241 U.S. at 563.[7]

Destruction of a species would preclude conservation and restoration of that species to levels where it could again be hunted by treaty and non-treaty fishermen. As the Supreme Court observed in *TVA* v. *Hill*, *supra*, 437 U.S. at 180, the Act is intended:

> to bring any endangered species to the point at which the measures provided pursuant to this Act are no longer necessary.

This approach is the most reasonable line of interpretation since any other conclusion necessitates the argument by Native Americans that they have a right to hunt a species to extinction—a construction (1) which has been repeatedly rejected

[7] See also, *United States* v. *Fryberg*, 622 F.2d 1010 (9th Cir. July 7, 1980). In a memorandum of May 9, 1977 to the Solicitor, p. 3 n. 2, the Acting Associate Solicitor for Indian Affairs concurred in this view observing that "neither party can destroy the subject matter of the treaty."

by the Supreme Court, (2) which would completely frustrate the intent of Congress and the broader public interest under the Endangered Species Act, (3) which would destroy a resource which should be preserved for future generations of Indians and non-Indians, and (4) which would not have been contemplated by 19th century treaty-makers.

This view is supported by a May 28, 1980 memorandum from the Acting Deputy Assistant Secretary for Indian Affairs to the Director of Fish and Wildlife Service which stated that "traditional Indian religions share a basic concern with the [Fish and Wildlife] Service—to ensure the continued well-being of the Nation's fish and wildlife and habitat." [8]

Given this express importance of fish and game to Native American's, the special relationship with the Indians of the United States, the federal obligation to preserve wildlife resources for future generations, and the delicate status of the species listed as endangered or threatened, even without the convincing Supreme Court opinions in the fishing rights cases, it would be clear that neither the Indians nor the United States ever intended or even contemplated that such treaty rights extended so far as to allow Native Americans to take a species which was threatened with extinction. Accordingly, it is my opinion that Native American treaty hunting and fishing rights were never intended to include the right to take a species whose very existence is threatened or endangered, since the statutes and regulations which protect those species are clearly reasonable and necessary for the conservation of those species.

To the extent such rights exist, they may have been abrogated or modified by the ESA.

There is also authority for the proposition that such treaty hunting and fishing rights may have been abrogated or modified by Congress when it enacted the Endangered Species Act.

The general rule, endorsed by this Department, 78 I.D. 19 (Feb. 1, 1971) and the leading authority on Indian Law, Cohen, Federal Indian

[8] I think it is interesting to cite Chief Wenimock of the Yakimas who were parties to one of the much litigated Stevens treaties in the Pacific Northwest. In 1915, speaking of the hunting and fishing to which he was accustomed, he said:

"Then the Creator gave us Indians Life; we walked, and as soon as we saw the game and fish we knew they were made for us * * * We had the fish before the Missionaries came, before the White man came * * * This was the food on which we lived. My mother gathered berries; my father fished and killed the game * * * My strength is from the fish; my blood is from the fish, from the roots and berries. The fish and the game are the essence of my life."

Proceedings of the New Jersey Historical Society, New Series, vol. 13, 1928, pp. 477–479, cited in McLuhan, T. C., *Touch The Earth*, Outerbridge and Dienstfrey (New York 1971), p. 10. Ms. McLuhan's collection has numerous statements by various Indian chiefs which almost create a presumption against an intention on the part of the Indians to eliminate a species. *Id.*, p. 45 (Oglala Sioux); 49 (Micmac); 53 (Blackfoot); 67, 71 (Sioux).

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Law, 147, n. 224 (1st ed. 1942), is that federal laws of general application apply to Indian country and Indian property interests. *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960).

In each case, the inquiry is whether Congress' intent to modify or abrogate treaty obligations can be derived from the statute and the surrounding circumstances. *Rosebud Sioux Tribe*, *supra*, 430 U.S. at 586–587. Nonetheless such a finding must be sufficiently compelling to defeat the presumption against such abrogation or modification. *Menominee Tribe*, *supra*, 391 U.S. at 412.

The congressional intent of the ESA and the scheme for its enforcement were found to be compellingly clear in *TVA* v. *Hill*, 437 U.S. 153, 172–184 (1978). Congress' purpose was to protect against the loss of animal and plant species, a loss which that body saw as incalculable. There is no real dispute over this intent and purpose.

There are however, no cases specifically ruling on any implied modification or abrogation of treaty hunting and fishing rights by the ESA, but two circuit courts have ruled on the issue with respect to the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 *et seq.* In *United States* v. *Fryberg*, 622 F. 2d 1010 (9th Cir. 1980), the court held that to the extent that treaty hunting and fishing rights were inconsistent with the Eagle Protection Act, Congress' intent, determined through the statute's purpose and the surrounding circumstances, modified those rights. In *United States* v. *White*, 508 F. 2d 453 (8th Cir. 1974), the court rejected this argument, holding that Congress must expressly abrogate such treaty rights and since the Eagle Protection Act had not done so, there was no abrogation.[9]

The *Fryberg* case has been appealed to the United States Supreme Court. Any resolution of that case by the Court would certainly have a bearing on the application of the ESA to Native Americans exercising hunting and fishing rights. If and when such a decision is reached, this office, of course, will reexamine the issue in

[9] In *Fryberg*, the court held that the Eagle Act applies to Native Americans exercising treaty hunting and fishing rights and that reasonable conservation statutes can apply to Indian treaty rights when (1) the sovereign exercising its police power has proper jurisdiction; (2) the statute is nondiscriminatory and applies to both treaty and non-treaty persons; and (3) the application of the statute to treaty rights is necessary to achieve its conservation purposes. 622 F. 2d at 1015. In so holding, the Ninth Circuit rejected the Eighth Circuit reasoning of *United States* v. *White*, and applied the type of analysis that the Supreme Court applied in the *Puyallup* cases. A number of cases are in accord with *Fryberg*. *United States* v. *Top Sky* cases, 547 F. 2d 483 484 (9th Cir. 1976), and 547 F. 2d 486, 488 (9th Cir. 1976). ("The Bald Eagle Protection Act is a federal statute of general applicability making actions criminal wherever and by whomever committed." *Accord.*, *United States* v. *Allard*, 397 F. Supp. 429, 431 (D. Mont. 1975). Also of note is the case of *United States* v. *Cutler*, 37 F. Supp. 724 (D. Idaho 1941), where the court held than an Act of Congress—the Migratory Bird Treaty Act, 16 U.S.C. § 703. *et seq.*—could not modify an Indian treaty right. *Contra*, *Thomas* v. *Gay*, 169 U.S. 264, 271 (1898); *United States* v. *Washington*, 384 F. Supp. 312, 411 (W.D. Wash. 1974); affirmed, 520 F. 2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

light of any Supreme Court holdings.[10]

Conclusion

The Endangered Species Act applies to Native Americans because treaty hunting and fishing rights simply do not include the right or power to take threatened or endangered species.[11] In the alternative, such application could also be made by a court if it found that the purpose and surrounding circumstances of the Endangered Species Act are sufficiently compelling and comprehensive to effect a modification or abrogation of those rights by Congress.

This opinion was prepared by the Division of Conservation and Wildlife of the Office of the Solicitor, Associate Solicitor, Gary Widman, in conjunction with the Division of Indian Affairs, Associate Solicitor, Hans Walker. The principal author was David C. Cannon, Jr.

CLYDE MARTZ
Solicitor

[10] This Department argued for the position approved in *Fryberg* when the prosecution of Fryberg was authorized by Deputy Solicitor Ferguson, but it will of course, be guided by any future judicial opinions on point.

[11] This approach has recently been taken by the United States District Court for the Western District of Washington on Sept. 26, 1980, in the case of *United States* v. *Washington*, Civil No. 9213—Phase II. The court held that the Indian tribes' allocation included fish released from hatcheries and that the State of Washington may not take any environmentally degrading action which would destroy the fishery habitat and impair treaty rights. In so holding, the court stated that the State's power to impose conservation measures to preserve the resource was an "implicit limitation" on the Indians' treaty fishing right. Slip opinion at 12. The court observed that "[t]he most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken." *Id.* at 21. The opinion clearly stands for the proposition that neither the State nor the tribes may take any action which destroys the fish—the very source of the treaty right.

UNITED STATES
v.
CAMERON CATLIN BOHME ET AL.
UNITED STATES
v.
EXXON CORP. ET AL.
UNITED STATES
v.
AIDABELLE BROWN ET AL.
(SUPPLEMENT)

51 IBLA 97

Decided *November 5, 1980*

Supplemental proceeding by Order of the United States District Court for the District of Colorado, dated Aug. 13, 1980, to determine whether various oil shale placer mining claims are supported by a qualifying discovery of a prospective valuable mineral deposit. Colorado Contest Nos. 658, 659, 660.

Some claims in Contest No. 658 held supported in part by discovery. All claims in Contest No. 659 held null and void for lack of discovery. All claims in Contest No. 660 held supported by discovery.

1. Mining Claims: Generally—Mining Claims: Determination of Validity—Mining Claims: Discovery: Market-

ability—Mining Claims: Marketability—Mining Claims: Placer Claims

Under *Andrus v. Shell Oil Co.*, —— U.S. ——, 64 L.Ed.2d 593 (1980), 48 U.S.L.W. 4603 (June 2, 1980), oil shale is a prospectively valuable mineral and therefore present marketability need not be shown to demonstrate discovery.

2. Mining Claims: Generally—Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally—Mining Claims: Placer Claims

To demonstrate a sufficient discovery of oil shale under *Freeman* v. *Summers*, 52 L.D. 201 (1927), a mining claimant must show that mineral was disclosed on or before Feb. 25, 1920, in such situation and such formation that he or she can follow the deposit to depth with reasonable assurance that paying minerals will be found. An isolated bit of mineral, not connected with or leading to substantial prospective values, does not constitute a discovery.

3. Mineral Lands: Determination of Character of—Mining Claims: Lands Subject To

A single discovery of mineral within a placer mining claim does not conclusively establish the mineral character of all the land included in the location. Whether the land embraced in the claim is mineral in character is an issue which remains open to investigation and determination by the Department until patent issues. The contestee must establish that each 10-acre tract within the entire claim is mineral in character, failing in which any nonmineral 10-acre tract is properly excluded from the patent application.

4. Mining Claims: Determination of Validity—Mining Claims: Discovery: Geologic Inference

Under *Freeman* v. *Summers*, 52 L.D. 201 (1927), an exposure of the Parachute Creek member, even though of limited extent, can be geologically inferred to embrace sufficient quantity of high grade oil shale so as to constitute a valuable mineral deposit.

Freeman v. Summers, 52 L.D. 201 (1927), is reinstated.

APPEARANCES: John Savage, Jr., Esq., Rifle, Colorado, for appellants in Contest No. 658; James Clark, Esq., and Bruce Pringle, Esq., Denver, Colorado, for appellants in Contest No. 659; H. Michael Spence, Esq., Denver, Colorado, Fowler Hamilton, Esq., and Richard W. Hulbert, Esq., New York, New York, and Donald L. Morgan, Esq., Washington, D.C., for appellants in Contest No. 660; Lowell L. Madsen, Esq., and Marla E. Mansfield, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

INTERIOR BOARD OF LAND APPEALS

The above-captioned cases are before the Interior Board of Land Appeals by Order of the United States District Court for the District of Colorado, dated Aug. 13, 1980. In this supplemental proceeding the Board is directed, with the consent of the parties hereto, to rule on the issue of whether the subject unpatented oil shale placer mining claims are each supported by a qualifying discovery of a mineral deposit.

These consolidated cases were the subject of the decision *United States* v. *Bohme*, 48 IBLA 267, 87 I.D. 248

(1980), in which the principal question presented by stipulation of the parties was whether contestees had substantially complied with the requirement of 30 U.S.C. § 28 (1976), that annual assessment work in the amount of $100 be performed for the benefit of each claim. We affirmed Administrative Law Judge Harvey C. Sweitzer's dismissal of the complaint against the Compass claims, and that portion of his decision holding the Carbon and Elizabeth claims invalid on the asserted ground. His dismissal of the complaint against the Oyler claims was reversed and those claims declared invalid.

In these final Departmental proceedings upon the issue of discovery, we are instructed that the record in *Andrus* v. *Shell Oil Co.*,[1] ____ U.S. ____, 64 L.Ed.2d 593 (1980), 48 U.S.L.W. 4603 (June 2, 1980), shall be considered part of the record in this proceeding. *See* Part B, Paragraph I, of Order of United States District Court, dated Aug. 13, 1980.

As before, the several groups of contestees shall be referred to by contest number, or by the claim group names. With respect to evidentiary citations, "W" denotes the administrative hearing record before Administrative Law Judge Dent D. Dalby in *United States* v. *Winegar, infra.* "B" denotes the evidence adduced at the District Court trial of these matters; "P" and "D" refer, of course, to contestee/plaintiffs and to the Government as defendant in that trial.

Until the enactment of the Mineral Leasing Act of Feb. 25, 1920 (Leasing Act), 30 U.S.C. § 181 (1976), oil shale was a locatable mineral. That Act withdrew oil shale, among other minerals, from location and purchase under the Mining Law of 1872, subject to the savings clause of sec. 37, 30 U.S.C. § 193 (1976), which provides in material part:

> The deposits of * * * oil shale, * * * herein referred to, in lands valuable for such minerals, * * * shall be subject to disposition only in the form and manner provided in this chapter, except as to valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.

Under the mining law, discovery of a valuable mineral deposit is the *sine qua non* for a valid mining claim. Through the years since enactment of the mining statute, the Department and the courts have held that a discovery of a valuable mineral deposit has been made where minerals have been disclosed and the evidence is of such quantity and quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. *United States* v. *Coleman*, 390 U.S. 599, 602 (1968); *Cameron* v. *United States*, 252 U.S. 450, 460 (1920); *Chrisman* v. *Miller*, 197

[1] The case originated in the Department as *United States* v. *Winegar*, 16 IBLA 112, 81 I.D. 370 (1974).

U.S. 313, 322 (1905); *Castle* v. *Womble*, 19 L.D. 455, 457 (1894). To be considered valuable, a mineral deposit must be capable of extraction, processing and marketing at a profit. *United States* v. *Coleman*, *supra* at 602; *Converse* v. *Udall*, 399 F.2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969). Accordingly, a mineral deposit which yields only meager profits has been held to be not valuable within the meaning of the general mining law, on the ground that no prudent person would invest in actual operations in such circumstances. *See, e.g.*, *United States* v. *Edwards*, 9 IBLA 197, 203 (1973), *aff'd*, *Edwards* v. *Kleppe*, 588 F.2d 671 (9th Cir. 1978); *United States* v. *Harper*, 8 IBLA 357, 369 (1972).

The Department has always required that a mining claimant show, as a *present fact*, that there is a reasonable prospect of success in developing an operating mine that will yield a reasonable profit. The concept was first enunciated in *Castle* v. *Womble*, *supra*, and received full approbation in *Chrisman* v. *Miller*, *supra*. The rule has been consistently followed since. Ordinarily, speculation as to future changes in market conditions, technological improvements or inventions, or anticipated mineral prices will not demonstrate as a present fact that the commencement of actual mining operations would be justified. *Foster* v. *Seaton*, 271 F.2d 836, 838 (D.C. Cir. 1959); *United States* v. *Denison*, 76 I.D. 233, 239 (1969); *United States* v. *Jenkins*, 75 I.D. 312, 318 (1968). The proper test to be applied to pre-1920 oil shale claims, however, has been the subject of extension and recent litigation.

Interest in oil shale has always been tied to the belief that the mineral will at some future time become competitive with the liquid petroleum industry. Thus, in 1916, Geological Survey (Survey) classified certain lands as prospectively valuable for their oil shale content and so not subject to disposition under the agricultural land laws.

Based in part on Survey's land classification, the *Instructions* of May 10, 1920, 47 L.D. 548 (1920), issued directing the adjudication of oil shale patent applications in accordance with the requirements and limitations applicable to oil and gas placer claims and the requirements of the mining law.

In 1927 the case of *Freeman* v. *Summers*, 52 L.D. 201, enunciated the rule implied in the 1920 *Instructions*. That decision held that oil shale is a prospectively valuable mineral, and that claimants therein had discovered a valuable deposit. In addition, the case held that claimants, having found a lean outcropping of a mineral deposit in the Parachute Creek formation, could reliably infer the existence of the richer beds at depth.

Until 1960 *Freeman* v. *Summers* provided the rationale for the patenting of many hundreds of oil shale claims. In the case of *United States* v. *Winegar*, 16 IBLA 112, 81 I.D. 370 (1974), the Department had occasion to re-examine the hold-

ing of *Freeman* v. *Summers*, *supra*. A single issue was there presented: Whether oil shale was a valuable mineral deposit as of Feb. 25, 1920, when the mineral was withdrawn from the operation of the general mining law by the Mineral Leasing Act, *supra*, and if so, whether such oil shale has continued to be a valuable mineral deposit within the meaning of the general mining law. This Board concluded, after an exhaustive survey of the industry and relevant law, that *Freeman* v. *Summers* had been wrongly decided, and overruled it as contrary to the provisions of the general mining law.

Contestees obtained review in the United States District Court for the District of Colorado. *Shell Oil Co.* v. *Kleppe*, 426 F. Supp. 894 (D. Colo. 1977). The District Court held that the Board's overruling of *Freeman* v. *Summers* was volative of Congressional legislative authority, on the theory that hearings conducted by the Congress in 1930 and 1931 constituted approval of a "liberalized" rule of discovery in the case of oil shale placer mining claims. *Shell Oil Co.* v. *Kleppe*, *supra* at 901. The Court ruled that the Congress had taken a "special attitude toward oil shale lands" and ratified *Freeman* v. *Summers* as "an exception to the traditional discovery rule" because of "the unusual role of oil shale as a natural resource in contrast to other locatable minerals." *Id.* The Government appealed the District Court's ruling.

In *Shell Oil Co.* v. *Andrus*, 591 F.2d 597 (10th Cir. 1979), that Court affirmed the District Court and held that (syllabus statement) "the different treatment afforded all oil shale claims [in the period 1920 to 1960] as to the 'valuable mineral deposit' element of a location became part of the general mining laws by reason of its adoption and approval by both houses of Congress during the intensive investigations of this very question and their affirmative resolution of the issue," and therefore concluded that "the changes herein sought to be made by the Department as to 1920 standards incorporated in the mining laws were beyond executive authority." *Id.*

The 10th Circuit result was affirmed *sub nom. Andrus* v. *Shell Oil Co.*, —— U.S. ——, 64 L.Ed. 2d 593 (1980), 48 U.S.L.W. 4603 (June 2, 1980). The Supreme Court stated the issues before the Department in *Freeman* v. *Summers* as "(1) whether *a finding of lean surface deposits* warranted the geological inference that the claim contained rich 'valuable' deposits below; and (2) whether present profitability was a prerequisite to patentability" (64 L.Ed. 2d 593 (1980), 48 U.S.L.W. 4603, 4606 (1980)). (Italics supplied.) Both issues were decided in favor of the oil-shale claimant.

[1] We think it clear beyond peradventure that oil shale is now a prospectively valuable mineral with respect to which present marketability need not be shown under *Shell Oil*, *supra*.

[2] *Freeman* v. *Summers* states that the mining law requires that

> mineral be discovered within the limits of the claim located; that the mineral indications shall be such as to warrant a prudent man in the further expenditure of time and money, with a reasonable prospect of success. In order to warrant that proceeding, he must have *discovered mineral in such situation and such formation that he can follow the vein* or the *deposit to depth*, with a reasonable assurance that paying minerals will be found. In other words, *the discovery of an isolated bit of mineral, not connected with or leading to substantial prospective values, is not a sufficient discovery;* * * * [I]t is sufficient * * * if he finds mineral in a mass so located that he can follow the vein or the mineral-bearing body, with reasonable hope and assurance that he will ultimately develop a paying mine. [Italics supplied.]

52 L.D. at 204, 205.

As we read *Freeman* v. *Summers*, an exposure of the Parachute Creek member, even though of limited extent, can be geologically inferred to embrace sufficient quantity of high grade oil shale so as to constitute a valuable mineral deposit. We thus perceive one of the issues before this Board is whether contestees' claims contain an exposure of the Parachute Creek member that can be followed to depth with a reasonable assurance that paying minerals will be found.

[3] A single discovery of mineral sufficient for the location of a placer mining claim does not, however, conclusively establish the mineral character of all the land included in the location. Whether land embraced in a location is mineral in character is an issue which remains open to investigation and determination by the Department until patent issues. "The statute, mining regulations, and decisions clearly contemplate that a placer location may be made of a 10-acre tract in square form. If such a tract, whether in a location by itself or included with other such tracts in a maximum location, is proven to be nonplacer ground, such tract can not pass to entry and patent under the placer application." *American Smelting and Refining Co.*, 39 L.D. 299 at 301 (1910). *See also United States* v. *McCall*, 7 IBLA 21 (1972); *Crystal Marble Quarries Co.* v. *Dantice*, 41 L.D. 642 (1913).

The Government has moved to dismiss the charge of lack of discovery against portions, *infra*, of the Southwest and Northwest claims, and against the Oyler Nos. 1 through 4 claims (Opening Brief pp. 77–78, 130). The motion is granted, and accordingly, the remainder of the discussion concerns only parts of the Southwest and Northwest claims, the Southeast and Northeast claims in their entirety, and the Carbon and Elizabeth claims.

THE COMPASS GROUP

These claims are physically located on the east face of a precipitous ridge called Cow Ridge.[2]

[2] The Compass claims are situate in W½E½NE¼, W½NE¼, N½NW¼, SW¼NW¼, NW¼SW¼, S½SW¼, SE¼, sec. 27, T. 7 S., R. 98 W., sixth principal meridian.

The claims are entirely underlain by the Green River formation, and contain the Uinta formation, the Parachute Creek and Lower Shaly [3] members (B–D 101(a), p. 4).

As previously noted, contestees in No. 658 applied for mineral patent in 1959. In connection therewith, Ralph Spengler, Warren Sholes, and James F. McIntosh, valuation engineers employed by the Bureau of Land Management (BLM), prepared a mineral report dated Jan. 26, 1960 (B–D 101(a)). On Nov. 10, 1959, contestees' representative obtained two samples from the claims. On Nov. 11, 1959, claimant John Savage obtained a third sample, and he and Spengler also obtained a fourth. All samples were taken from weathered outcrops, resulting in lower assays than would be the case if unexposed rock in place had been sampled.

On Feb. 25, 1963, Spengler submitted a supplemental mineral report (B–D 101(b)), in which additional sampling by Spengler and McIntosh on Aug. 21 and 22, 1962, was discussed. The supplemental report notes that the additional sampling was conducted to demonstrate that the Lower Shaly member contains "abundant barren sandstone and siltstone and only a few oil bearing marlstones" (B–D 101 (b), p. 8). It was observed that high grade oil shale should outcrop more prominently than the sandstone because of its greater resistance to weathering. The Compass claims contain no such outcroppings. Spengler concluded that the group contains "the lowest grade and thinnest [*sic*] bedded oil shale and the smallest total amount of potentially valuable oil shale of any deposit previously examined," particularly in the cases of the Southeast and the Northeast claims. *Id.* at 9.

In a second supplemental mineral report dated Mar. 16, 1977 (B–D 101(c)), Spengler identified those portions of the claims he found nonmineral in character: The Southeast and Northeast claims in their entirety; the $SW\frac{1}{4}SE\frac{1}{4}SW\frac{1}{4}$ and the $SW\frac{1}{4}SW\frac{1}{4}$ of the Southwest claim; and the $NE\frac{1}{4}NW\frac{1}{4}$ and the $E\frac{1}{2}NW\frac{1}{4}NW\frac{1}{4}$ of the Northwest claim, all in sec. 27, T. 7 S., R. 98 W., sixth principal meridian.

Spengler adverted to an interview with Ronald C. Johnson, who, in 1975, preliminarily mapped the area.[4] The report states that Johnson was of the opinion that "there are no oil shale beds below 'B' groove (the transitional zone immediately below the Mahogany zone) in the [vicinity of the Compass claims] other than one thin (less than one foot) bed." *Id.* at pp. 3–4.

He concluded, based upon the information available to him, that "there are only a few scattered low grade beds of oil shale below 'B' groove and that the beds are low grade and not feasible for exploitation using current mining heights

[3] This informal nomenclature refers to the lower third of the Parachute Creek member.

[4] Geological Survey Map MF–688, "Preliminary Geologic Map, Oil Shale Yield Histograms and Stratigraphic Sections, Long Point Quadrangle, Garfield County, Colorado."

and cutoff grades." Therefore, regarding only the beds above "B" groove as valuable beds, Spengler stated that erosion had removed such valuable beds from the Northeast and Southeast claims entirely, and that a total of 61 percent and 68 percent of those beds had been eroded from the Southwest and Northwest claims, respectively, B–D 101(C), Table 1.

THE CARBON AND ELIZABETH CLAIMS

These claims are situated in secs. 32 through 36, T. 4 S., R. 97 W., sixth principal meridian.[5] Neither the Douglas Creek nor the Garden Gulch members, or their lateral equivalent, the Anvil Point member, is exposed upon the claims. The Parachute Creek member does not outcrop on these claims, though it is exposed less than 2 miles away from the Carbon No. 4 and the Elizabeth No. 1 (B–D 210, p. 23). The Mahogany marker is some 490 to 900 feet below the surface of the claims. *Id.* at p. 22. The principal exposure is of the Uinta formation, with interfingering of the Bull Fork, Barnes Ridge, Stewart Gulch, and Coughs Creek marlstone tongues, which are not generally well exposed. *Id.* at pp. 23–24.

Several holes were drilled on the claims. Of these, only two penetrated the Parachute member. The Carbon hole, located on the Carbon No. 4 claim, intersected the Mahogany marker at 435 feet below the surface. The Elizabeth 1 hole, located on the Elizabeth No. 4 claim, intersected the Mahogany marker at 724 feet. Neither corehole is positioned so that contestees might claim a discovery benefitting any adjoining claims, except inferentially (B–D 105, B–D 203, B–D 204). These coreholes, however, were drilled after Feb. 25, 1920.

Under the principles earlier discussed, we conclude that the charge of lack of discovery must be sustained against some of the Compass claims, and against the Carbon and Elizabeth claims in their entirety.

The Northeast and Southeast claims are null and void for lack of a sufficient discovery under *Freeman* v. *Summers*. There are no exposed values within the claim which appear to connect with or lead to substantial prospective values. The valuable oil shale member has been completely eroded away.

The remaining claims have been examined in 10-acre tracts. *See* Table 1, B–D 101(C). We hold that the following tracts of the Southwest claim must be excluded from contestees' pending application for patent, as nonmineral in character:

T. 7 S., R. 98 W., sixth principal meridian
Sec. 27
SW¼SW¼
SW¼SE¼SW¼.

In the instance of the Northwest claim, the following 10-acre tracts are held to be nonmineral in char-

[5] The Carbon and Elizabeth claims are situate in N½N½ sec. 32 and in secs. 33 through 36, T. 4 S., R. 97 W., sixth principal meridian, their entirety. Portions of the surface and mineral estates have been patented and are not here involved.

acter and are accordingly excluded from the patent application:

T. 7 S., R. 98 W., sixth principal meridian
Sec. 27
NE¼NW¼
E½NW¼NW¼.

The remaining portions of the Northwest and the Southwest claims are held to be supported by a discovery of valuable mineral deposit, and the charge of lack of discovery in the contest complaint is dismissed as to them. Those tracts are as follows:

T. 7 S., R. 98 W., sixth principal meridian
Sec. 27
SW¼NW¼
NW¼SW¼
W½NW¼NW¼
N½SE¼SW¼
SE¼SE¼SW¼.

[4] None of the Carbon and Elizabeth claims contain disclosures of mineral. The corehole findings avail contestees nothing as they were drilled after Feb. 25, 1920. As we read *Freeman* v. *Summers* an exposure of the Parachute Creek member, even though of limited extent, can be geologically inferred to embrace sufficient quantity of high grade oil shale so as to constitute a valuable mineral deposit. Nevertheless, the physical exposure of that member is the *sine qua non* of a discovery, and absent a discovery in existence on Feb. 25, 1920, the claims were not excepted from the provisions of the Mineral Leasing Act. The Carbon and Elizabeth claims are therefore declared null and void on the ground that they contained no *exposure* of a valuable mineral deposit upon which claimants could rely to geologically infer the existence of richer beds at depth as of Feb. 25, 1920.

The existence of qualifying discoveries on each of the Oyler claims is conceded by the Government and we hold the complaint regarding these claims dismissed as to the discovery charge.

We adhere, however, to our decision in *United States* v. *Bohme*, *supra*, in which the Compass claims were held valid, and the Carbon and Elizabeth, and Oyler claims declared null and void on the sole ground of failure to comply with the provisions of 30 U.S.C. § 28 (1976), governing annual assessment work. All else being regular, therefore, those portions of the Northwest and Southwest claims as hereinbefore described, *supra*, shall immediately proceed to patent, all else being regular.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, in Contest No. 658, the portions named above of the Northwest and Southwest claims held supported by a discovery, shall proceed to patent, all else being regular. The Northeast and Southeast and remaining portions of the Northwest and Southwest claims in Contest No. 658 are null and void for lack of a discovery. In Contest No. 659, the Carbon and Elizabeth claims are held null and void on the grounds of lack of a discovery and failure to substantially comply with

the assessment work provisions of the mining law. In Contest No. 660 the withdrawal of the charge relating to lack of discovery is accepted, but the Oyler claims are declared null and void on the ground of failure to substantially comply with the assessment work provisions.

DOUGLAS E. HENRIQUES
Administrative Judge

WE CONCUR:

EDWARD W. STEUBING
Administrative Judge

JAMES L. BURSKI
Administrative Judge

GULF OF MEXICO EXEMPTION FROM SEC. 25 OF THE OUTER CONTINENTAL SHELF LANDS ACT, AS AMENDED

M–36923

November 5, 1980

1. Outer Continental Shelf Lands Act: Oil and Gas Leases

The Secretary's mandate under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* (Supp. II 1978), to administer and supervise development and production of the oil and gas resources of the OCS could not be accomplished without the authority to require development and production plans from oil and gas lessees in the Gulf of Mexico.

2. Outer Continental Shelf Lands Act: Oil and Gas Leases

Sec. 25 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1351 (Supp. II 1978), does not deprive the Secretary of authority to require development and production plans for oil and gas leases in the Gulf of Mexico.

3. Outer Continental Shelf Lands Act: Oil and Gas Leases

Secs. 25(a)(1) and 25(b) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1351 (a)(1) and (b) (Supp. II 1978), exempt oil and gas lessees in the Gulf of Mexico and OCS lessees who have discovered oil or gas in paying quantities at the time of enactment of these sections from submitting development and production plans which meet the requirements of sec. 25 of the Act.

4. Outer Continental Shelf Lands Act: Oil and Gas Leases

The Secretary need not apply the criteria of sec. 25(c) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1351(c) (Supp. II 1978), which describe the contents of a development and production plan, to lessees in the western Gulf of Mexico if the full range of information required by sec. 25(c) is not necessary for effective administration of the exempted leases.

5. Outer Continental Shelf Lands Act: Oil and Gas Leases

The submission of environment reports is not necessary for oil and gas lessees in the Gulf of Mexico except where the environmental information in the report is necessary for a state with an approved coastal zone management plan to make a consistency determination or is necessary for the Secretary to carry out his statutory responsibilities.

6. Outer Continental Shelf Lands Act: Oil and Gas Leases

No environmental impact statements need be prepared prior to the approval of development and production plans for oil and gas leases in the western Gulf of Mexico.

7. Outer Continental Shelf Lands Act: Oil and Gas Leases

The Secretary is not required to follow the approval time frames set out in sec. 25(g) and (h) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1351(g) and (h) (Supp. II 1978), when considering development and production plans submitted by oil and gas lessees in the western Gulf of Mexico.

8. Outer Continental Shelf Lands Act: Oil and Gas Leases

Oil and gas leases in the western Gulf of Mexico are not exempt from the requirement in sec. 19 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1345 (Supp. II 1978), which provides that the Governor of any affected state and the executive of any affected local government in such state shall have a 60-day period, prior to the approval of a development and production plan for a lessee to submit recommendations to the Secretary.

9. Outer Continental Shelf Lands Act: Oil and Gas Leases

Oil and gas lessees in the western Gulf of Mexico are not exempt from sec. 5(a)(8) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1334(a)(8) (Supp. II 1978), requiring that lessees comply with air quality standards to the extent that authorized activities significantly affect the air quality of any state.

10. Outer Continental Shelf Lands Act: Oil and Gas Leases

Western Gulf of Mexico lessees conducting activities for which a Federal license or permit is required and which affect any land use or water use in the coastal zone of a state with an approved state coastal zone management program are not exempt from the federal consistency requirements of secs. 25(d) and 25(h) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1351(d) and (h) (Supp. II 1978).

To: Secretary
From: Solicitor
Subject: Gulf of Mexico Exemption from Sec. 25 of the Outer Continental Shelf (OCS) Lands Act, as amended

Prior to the publication of the proposed OCS Exploration and Development Plan Regulations (44 FR 3513 (Jan. 17, 1979)), you asked our opinion to to whether the language of sec. 25 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1351 (Supp. II 1978) (all cites hereinafter to Supp. II 1978), precludes the Department from continuing to require the submission of development and production plans in all areas of the Gulf of Mexico. We indicated that the exemption language of sec. 25 could be reasonably interpreted to mean that plans for all areas of the Gulf of Mexico could still be required by the Secretary as they were prior to enactment of the 1978 amendments, but that the new procedural requirements, content criteria, and other new provisions contained in sec. 25 of those amendments were not intended by Congress to be applicable to Gulf of Mexico lessees. Consistent with that interpretation, the regulations were drafted and promulgated to require development and production plans for all areas including the Gulf of Mexico but to exempt lessees in the Gulf (except off the coast of Florida) from the requirement that environ-

mental reports be submitted with their development and production plans. See 30 CFR. 250.34–2, 44 FR 53686 (Sept. 14, 1979).

In light of a petition for revision of this provision by the American Petroleum Institute, you have now asked us to reexamine this issue and determine whether we remain convinced that the Department has the authority to continue to require submission of development and production plans for oil and gas leases in the Gulf of Mexico.

CONCLUSION

Based on the Department's mandate to administer and supervise development and production of the oil and gas resources of the OCS, the statutory language of sec. 5 and sec. 25 of the OCS Lands Act, language in the Conference Committee report, and discussions which occurred during the Conference Committee meetings, we have concluded that our initial view was correct. The Department has the authority to continue to require development and production plans from all lessees in the Gulf, but the procedures and content criteria established in the 1978 amendments do not apply to these operations except in the eastern Gulf off Florida. The reasons for our conclusion are described below.

A. THE DEPARTMENT'S MANDATE TO SUPERVISE OCS OPERATIONS

Under sec. 5 of the OCS Lands Act, the Secretary of the Interior is responsible for the management, development, and protection of the oil and gas resources of the entire OCS. 43 U.S.C. § 1334. A multitude of functions is necessary to fulfill this mandate, including, but not limited to, the following:

1. The Secretary must insure that lessees exploring, developing and producing OCS leases issued after Sept. 18, 1978, use the best available and safest technologies. 43 U.S.C. § 1347(b). *See* 43 U.S.C. §§ 1332(b), 1801(6) and 1802(3).

2. He has authority to prevent waste and to insure the conservation of the natural resources of the OCS. 43 U.S.C. § 1334(a).

3. He must insure the prompt and efficient exploration, development and production of the oil and gas resources of the OCS. 43 U.S.C. §§ 1334(a)(7) and 1337(b)(4). *See* 43 U.S.C. §§ 1802 (1) and (2).

4. In conjunction with other Federal agencies he must enforce all health, safety, and environmental laws and regulations on the OCS. 43 U.S.C. § 1334(a).

5. In conjunction with the Department of Energy, he must insure that OCS lessees produce oil and gas at appropriate rates. 43 U.S.C. § 1334(g).

6. He must consider the recommendations of the Governors of affected states and other local officials regarding proposed lease sales and proposed development and production plans. 43 U.S.C. § 1345. *See* 43 U.S.C. §§ 1332(4), 1802(5) and (6).

7. He has the authority to grant suspensions of operations or suspensions of production when necessary

to facilitate proper development of leases or to allow the construction or negotiation of use of transportation facilities and to order such suspensions for environmental reasons. 43 U.S.C. §§ 1334(a)(1) and 1337(b)(5).

8. He may authorize or require unitization of leases. 43 U.S.C. § 1334(a)(4).

9. He must insure compliance with air quality standards. 43 U.S.C. § 1334(a)(8).

It is impossible to carry out these functions unless the Secretary has the authority to require information from lessees relating to their development and production activities and has the ability to disapprove such activities if they are not consistent with the OCS Lands Act and implementing regulations. The development and production plan is an appropriate way to obtain such information. Furthermore, the ability to approve or disapprove such a plan gives the Secretary the necessary control over development and production activities.

A development and production plan may contain information to assure the Secretary that the best available and safest technologies are being used, that development and production rates are adequate, that the environment is being adequately protected, and that the oil and gas reserves and other natural resources of the OCS are being conserved. Likewise, without the information typically set forth in development and production plans, such as the time schedules, he would not know whether suspensions of operations requested by lessees should be granted.

The Secretary has thus found development and production plans to be essential tools. Without them he could not properly supervise and manage OCS activities in the Gulf of Mexico, where over 95% of this country's current OCS development and production occurs. We do not believe that Congress, by creating the Gulf of Mexico exemption in sec. 25, intended at best to handicap and at worst to prevent the Secretary from carrying out his supervisory responsibilities over these OCS activities.

We have examined the existing regulations and find that the information they require to be included in development and production plans for leases in the Gulf of Mexico is consistent with the Secretary's duty to supervise properly OCS activities in that region. The regulations provide, for example, that environmental reports are only required for these leases when development and production activities would affect a land or water use in the coastal zone of a State with an approved coastal zone management program. See 30 CFR 250.34–1(a)(2)(ii) and 250.34–2(a)(3)(i). In addition, the regulations specifically allow the Director of the Geological Survey, after consultation with the Office of Coastal Zone Management and the affected State, to limit the information in such environmental

reports to that necessary for a State to make a coastal zone consistency determination. See 30 CFR 250.34–3(a)(1)(iii) and 250.34–3(b)(1)(iv). Furthermore, in the interest of reducing the burden on Gulf of Mexico lessees, the regulations also allow the Director to limit the amount of information in these development and production plans to only that necessary to assure compliance with applicable law and established lease terms. See 30 CFR 250.34–2(a)(2). The foregoing clearly demonstrate the practice of the Secretary to impose reporting requirements on Gulf of Mexico lessees only to the extent necessary to carry out his statutory duties.

B. THE STATUTORY LANGUAGE

The specific language of sec. 25(a)(1) indicates that Congress did not intend to deprive the Secretary of authority to require development and production plans for Gulf of Mexico leases. That section provides:

> Prior to development and production pursuant to an oil and gas lease issued after the date of enactment of this section in any area of the outer Continental Shelf, other than the Gulf of Mexico, or issued or maintained prior to such date of enactment in any area of the outer Continental Shelf, other than the Gulf of Mexico, with respect to which no oil or gas has been discovered in paying quantities prior to such date of enactment, the lessee shall submit a development and production plan (hereinafter in this section referred to as a "plan") to the Secretary, *for approval pursuant to this section.* [43 U.S.C. § 1351(a)(1) (Italics added).]

The language does not suggest that lessees in the Gulf of Mexico and lessees with leases issued prior to enactment of the regulations are totally exempt from any requirement to submit a plan. Instead it states that these lessees are not required to submit a plan "*for approval pursuant to this section.*" The fact that Congress added the phrase "for approval pursuant to this section" indicates that the exemption was created to insure that the development and production plans submitted by these lessees were not subject to the statutory procedures, approval time frames, environmental requirements and content criteria the Congress was requiring for other, non-exempt plans.

This interpretation is reinforced by the language of sec. 25(b) which again makes it clear that Gulf of Mexico lessees, as well as other lessees with leases issued before enactment of the amendments, are exempt from the imposition of the *new* requirements of sec. 25. That section provides:

> After the date of enactment of this section, no oil and gas lease may be issued pursuant to this Act in any region of the outer Continental Shelf, other than the Gulf of Mexico, unless such lease requires that development and production activities be carried out in accordance with a plan *which complies with the requirements of this section.* [43 U.S.C. § 1351(b) (Italics added).]

Again, as in sec. 25(a), the exemptions created excuse lessees in the Gulf of Mexico and lessees with leases existing at the time of enactment of the amendments from submitting plans *which comply with*

the requirements of this new section. It does not, however, excuse them from submitting any plan whatsoever.

Sec. 25(e)(1) buttresses this interpretation. It provides:

> At least once the Secretary shall declare the approval of a development and production plan in any area or region (as defined by the Secretary (of the outer Continental Shelf, *other than the Gulf of Mexico*, to be a major Federal action. [43 U.S.C. § 1351(e)(1) (Italics added).]

If Congress had intended that no development and production plans be submitted for the Gulf, there would have been no reason to add the exception "other than the Gulf of Mexico" to this provision. This provision requires that in any area of the OCS except the Gulf of Mexico, at least one EIS must be done prior to approval of a development and production plan, but that in the Gulf, an EIS will not be necessary prior to the approval of a development and production plan. Had Congress intended that no plans be submitted by lessees in the Gulf, this provision exempting the approval of plans in the Gulf of Mexico from NEPA requirements would have been superfluous.

The final provision of sec. 25 which addresses the Gulf of Mexico exemption is sec. 25(*l*) which provides:

> The Secretary may require *the provisions of this section* to apply to an oil and gas lease issued or maintained under this Act, which is located in that area of the Gulf of Mexico which is adjacent to the State of Florida, as determined pursuant to section 4(a)(2) of this Act. [43 U.S.C. § 1351(l) (Italics added).]

The underlined phrase is important here. Consistent with the other applicable language in sec. 25, Congress indicated by these words that the exemption went to the development and production plan requirements of the amendments, and not to the submission of a development and production plan. Had Congress intended the latter, it would have simply provided that the Secretary may require the submission of development and production plans for areas of the Gulf of Mexico adjacent to Florida.

Thus the pattern of exempting Gulf of Mexico lessees from the new requirements imposed by the amendments, but not from the submission of development and production plans, recurs consistently throughout sec. 25. It is our opinion that this statutory language contradicts the theory that sec. 25 strips the Secretary of authority to require that western Gulf of Mexico lessees submit development and production plans.[1]

The position of the American Petroleum Institute ignores the genesis of the requirement for development and production plans which was sec. 5 of the Outer Continental Shelf Lands Act of 1953. Sec. 5 was used as the authority as far back as 1954 to require plans similar in character to those now called de-

[1] The term "western Gulf of Mexico" is used herein to describe all OCS areas of the Gulf of Mexico except those in the eastern Gulf off the coast of Florida.

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velopment and production plans. *See* 19 FR 2657 (May 8, 1954). Sec. 5 read, in part, as follows:

> The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and notwithstanding any other provisions herein, such rules and regulations shall [as of their effective date] apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter. [67 Stat. 464; 43 U.S.C. § 1334(a)(1)(1976).]

Although sec. 5 was amended in certain respects in 1978, the foregoing language remains unchanged (*see* 43 U.S.C. § 1334(a)) and in our view still constitutes authority to require such plans.

The American Petroleum Institute appears to believe that sec. 25 embodies the exclusive provision concerning the requirement for development and production plans and that sec. 25 therefore supersedes sec. 5 in this respect. It thus relies on the doctrine of repeal by implication. The Supreme Court, however, has consistently applied the rule that repeals by implication are not favored; that the intention of the legislation to repeal must be clear and manifest; that every attempt must be made to reconcile the statute involved; and that a repeal by implication will be found only where there is a "positive repugnancy" between the statutes in question. *Morton* v. *Mancari*, 417 U.S. 535, 549–551 (1974); *United States* v. *Borden Co.*, 308 U.S. 188, 198–199 (1939).

In our view, the relationship between sec. 5 and sec. 25 does not meet these rigorous standards. The two sections can readily coexist as described above and there is no "positive repugnancy." Implied repeal is particularly abhorrent here where Congress had an opportunity to amend sec. 5 to reflect the exclusivity of sec. 25 and chose not to do so.

In practical terms, we believe that the exemption means that:

1. It is not necessary for the Secretary to apply the criteria of sec. 25(c), which describe the contents of a development and production plan, to lessees in the western Gulf of Mexico if the full range of information required by sec. 25(c) is not necessary for effective administration of the exempted leases;

2. The submission of environmental reports will not be necessary for lessees falling within the exemption except where the environmental information in the report is necessary for a state with an approved coastal zone management plan to make a consistency determination or is necessary for the Secretary to carry out his statutory responsibilities;

3. No EIS's need be prepared prior to the approval of development and production plans in the western Gulf of Mexico; and

4. The Secretary is not required to follow the approval time frames set out in secs. 25(g) and (h) when considering development and production plans submitted by western Gulf of Mexico lessees.

There are certain requirements in the amendments, however, from which western Gulf of Mexico lessees are not exempt. Sec. 19 provides that "[A]ny Governor of any affected State and the executive of any affected local government in such State" shall have a 60-day period, prior to the approval of a development and production plan, to submit recommendations to the Secretary. 43 U.S.C. § 1345. This provision contains no exceptions or exemptions and thus the 60-day comment period must be made available to the Governors of Louisiana, Texas, Mississippi and Alabama. The air quality regulations which the Department has promulgated also apply to western Gulf of Mexico lessees since sec. 5(a)(8) requires that lessees must comply with air quality standards to the extent that activities authorized under the act significantly affect the air quality of *any* state. 43 U.S.C. § 1334(a)(8). Finally, western Gulf of Mexico lessees conducting activities for which a federal license or permit is required and which affect any land use or water use in the coastal zone of a state with an approved state coastal zone management program are not exempt from the federal consistency requirements of secs. 25(h) and 25(d). Sec. 608(a) of the OCS Lands Act Amendments provides:

> *Except as otherwise expressly provided in this Act*, nothing in this Act shall be construed to amend, modify, or repeal any provision of the Coastal Zone Management Act of 1972, the National Environmental Policy Act of 1969, the Mining and Mineral Policy Act of 1970, or any other Act. [43 U.S.C. § 1866(a) (Italics added).]

Neither sec. 25(d) nor 25(h) contains an explicit exemption for Gulf of Mexico lessees and thus they are subject to the consistency requirement.

C. THE LEGISLATIVE HISTORY

The legislative history on this subject is, in places, confusing. Some of the statements in the early history of the amendments suggest that at least some members of Congress understood the language of sec. 25 to create an exemption from any requirement that development and production plans for leases in the Gulf of Mexico be submitted to the Department. However, a discussion which occurred on June 28, 1978, during one of the Conference Committee meetings on the amendments, indicates that the conferees and authors of the legislation understood the limited nature of the exemption. The Conference Committee was discussing sec. 25(l) which was included in the House version of the bill. That section provided:

> An oil and gas lease issued or maintained under this Act which is located in any

area which is not a frontier area shall be subject to the provisions of this section if the Secretary determines, pursuant to regulations prescribed by the Secretary that the likely environmental or onshore impacts of the development and production of such lease make the application of the provisions of this section in the public interest.

Senator Johnston began the discussion:

Mr. Chairman, I have a question here about whether in the Western Gulf, whether [*sic*] there is production at the present time whether the *requirements for environmental impact statements* between exploration and production would apply, and whether the *transmittal of information to the states would apply.* The predicate for my question is, my understanding is under regulations issued in January that the Secretary is treating the existing area of production in the Gulf to incorporate this requirement of environmental impact statement between exploration and production.

Frankly, I had an amendment drawn to exclude that area from that requirement.

I would like to ask counsel if, under this language, that is required?

Mr. Belsky: *Under this language in the Gulf of Mexico, whatever existing regulations require is not affected. Existing regulations in operation since December 1975 introduced by then Secretary Kleppe provide for development and production plans and onshore impact statement (sic) to be submitted to affected states.* That was done.

The recent provisions introduced expanded what information has to go to the states, but did not change the basic provision that was included originally in December 1975. This provision, without L—without L—would mean that existing law, the submission of D&P plans were to change—the provision of this section requiring EIS, requiring certain types of information to be supplied, and certain procedures for review would not apply. It would only apply to areas that are "frontier, excluding Gulf of Mexico."

Senator Johnston: Would this language put an imprimatur of this bill on the existing regulations?

Mr. Belsky: No, sir, not one way or another. It does not affect, as we discussed in the exploration area, *it does not say one way or another where we approve or disapprove of existing regulations.* We believe for these areas that are meant to be covered, the regulations should be as provided for in this section.

Senator Johnston: Mr. Chairman, there is a problem here we have been discussing for the last 30 minutes or so about when those regulations were promulgated, what they require.

It seems to me that in the area of the existing Gulf, our existing production, where we have been producing for over 33 years, that these requirements for additional environmental impact statements are unwise.

Now, Mr. Belsky advises that since this is in both bills that we would not have the power to extricate that requirement from these bills. I would suggest, therefore, in lieu of an amendment to have report language which would make it clear than we are not putting any imprimatur or any approval on these regulations, and that we should have language to the effect that in areas of existing production in the Gulf that the Secretary should minimize the delay and red tape requirements on both exploring for and producing oil and gas.

I do not know whether that will achieve fully what I want to achieve, but at least it will be some statement.

Senator Jackson: I would hope, Mr. Chairman, that could be agreed to. I think that is reasonable.

The Chairman: Is there objection?

Senator Jackson: That would be the language in the statement as part of the managers.

Senator Johnston: And L is dropped. (From Conference Committee Transcripts of June 28, 1978) (Italics added).

Mr. Belsky's explanation of the language of sec. 25 regarding the Gulf of Mexico exemption demonstrates the intent of the exemption language: the existing requirement that a development and production plan be submitted in the Gulf would not be affected; however, the new sections of the amendments "requiring EIS, requiring certain types of information to be supplied, and certain procedures for review would not apply." Clearly the Congressional concern was with onerous and unnecessary environmental reporting requirements and time-consuming review of the plans by state and local governments and not over the basic plan submission requirement.

The Joint Explanatory Statement of the Conference Committee confirms this intent. It states:

> Both versions contain detailed and similar provisions describing development and production plans. The House amendment requires a development and production plan to be submitted for all future leases in a frontier area. The Senate bill provides for a development and production plan to be submitted for all future leases anywhere. The conference report requires a plan to be submitted for all future leases except in the Gulf of Mexico.
>
> The House amendment also requires a plan to be submitted for existing leases in frontier areas, where no oil or gas has been yet discovered. The Senate bill similarly requires a plan to be submitted for existing leases where there has not yet been a discovery, but exempts the Gulf of Mexico. The conference report adopts the Senate language. Thus the mandate and specific procedures of this bill that the Secretary of Interior must secure submission, and then review, approve, or disapprove a development and production plan applies to new leases or existing leases where there has been a discovery and does not apply to leases, old or new, in the Gulf of Mexico. *This does not affect the existing requirements on lessees, already established by the Secretary of Interior.*
>
> The conferees, by recommending the enactment of section 25 to the Congress, are not approving or disapproving existing requirements for development and production. *It is hoped that the Secretary of Interior will apply existing law and requirements to tracts which have commenced development and production, and to other areas in the Gulf of Mexico, where development and production activities have been going on for a number of years,* in such a manner as to limit bureaucratic redtape and otherwise minimize delays in the search for and production of oil and gas.
>
> The requirements of this new section are specifically made inapplicable to the Gulf of Mexico. However, there are areas in the eastern gulf that have never been developed. While a sale—the so-called MAFLA sale—has been held for this region, no development or production has occurred there. The conferees therefore adopt a provision that gives the Secretary of the Interior the discretion to require submission of plan *in accordance with this section*—for development and production activity in this area which is defined as being adjacent to the State of Florida. [H. Rep. No. 1091, 95th Cong., 2d Sess. 115–116 (1978) (italics added).]

This final conference statement demonstrates that the existing requirement that development and production plans be submitted in the Gulf was not eliminated, but that the new and more burdensome procedures and requirements incor-

porated into the development and production plan process were not regarded as applicable to lessees in the western Gulf of Mexico. Thus the most authoritative legislative history supports the natural interpretation of the language of the Act itself.

SUMMARY AND CONCLUSION

The Department has the authority to require development and production plans from all lessees in the Gulf, but the procedures and content criteria established in the 1978 amendments do not apply to these operations except in the eastern Gulf off the Florida coast. Our opinion is based upon:

1. The general purpose of the statute, which is to give the Secretary of the Interior the authority to supervise and manage development and production of the oil and gas resources of the OCS;

2. The statutory language of secs. 5 and 25 of the OCS Lands Act; and

3. The legislative history of the 1978 amendments, and in particular the language in the Joint Explanatory Statement of the Conference Committee, which explicitly states that the Department should apply existing requirements to Gulf of Mexico tracts.

One final point should be made. The Department has recently published proposed regulations which provide a "plan of operations" to be submitted in lieu of a development and production plan for leases in the western Gulf of Mexico. 45 F.R. 52408 (Aug. 7, 1980). Under the regulations, a plan of operations would be required for a lease in the western Gulf of Mexico. Although similar to a development and production plan, it need not contain the new requirements of sec. 25 of the OCS Lands Act. In this regard, the regulations are consistent with and supported by this opinion. It is important to recognize that the regulations call for a plan of operations to be submitted "in lieu" of a development and production plan, so that requirements such as the time for recommendations under sec. 19 would be triggered by the receipt of a proposed plan of operations which would replace the development and production plan for such leases.

CLYDE MARTZ
Solicitor

WOLVERINE COAL CORP.

2 IBSMA 325

Decided *November 7, 1980*

Appeal by the Office of Surface Mining Reclamation and Enforcement (OSM) from a June 6, 1980, decision of Administrative Law Judge Tom M. Allen in Docket No. NX 0-121-R, vacating Notice of Violation No. 80-2-18-6 on the grounds that OSM lacked jurisdiction over Wolverine Coal Corporation's tipple operation.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: In Connection

With—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface coal mining operations." When a tipple is owned and operated by the same company that owns and operates the two mines supplying most of the coal processed through the tipple, that tipple is operated "in connection with" a surface coal mine within the meaning of "surface coal mining operations" in 30 CFR 700.5.

2. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: At or Near a Minesite—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface coal mining operations." When a tipple is operated in connection with two surface coal mines and is located 7 and 13 miles from those mines, that tipple is held to be "near" the minesite within the meaning of "surface coal mining operations" in 30 CFR 700.5.

APPEARANCES: Courtney W. Shea, Esq., Office of the Field Solicitor, Knoxville, Tennessee, James M. McElfish, Esq., and Mark Squillace, Esq., Office of the Solicitor, Division of Surface Mining, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed a June 6, 1980, decision of Administrative Law Judge Tom M. Allen, vacating Notice of Violation No. 80–2–18–6 on the grounds that OSM lacked jurisdiction over Wolverine Coal Corporation's (Wolverine) tipple operation. For the reasons set forth below, we reverse that decision.

Background

On Jan. 29, 1980, OSM inspected Wolverine's Hickory Tipple, permit No. 277–8000, on Brushy Fork of Gun Creek in Magoffin County, Kentucky, pursuant to the Surface Mining Control and Reclamation Act of 1977.[1] The permit area, which was in excess of 2 acres, lacked a sedimentation pond (Tr. 4, 8, 9, 12, 14). Accordingly, OSM issued Notice of Violation No. 80–2–18–6 for a violation of 30 CFR 715.17(a).[2]

Wolverine sought review of this notice and, on Apr. 3, 1980, a hearing was held. In his written decision of June 6, 1980, the Administrative Law Judge held that OSM has no jurisdiction over the tipple in question. OSM filed a timely appeal and a brief. Wolverine did not file a brief.

Discussion and Conclusion

In *Drummond Coal Co.*, 2 IBSMA 96, 87 I.D. 196 (1980) (*Drummond I*), the Board stated a two-part test for determining whether a coal processing or loading facility is a surface coal mining operation

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. II 1978).

[2] 30 CFR 715.17(a) requires that "[a]ll surface drainage from the disturbed area, * * * shall be passed through a sedimentation pond or a series of sedimentation ponds before leaving the permit area."

within the meaning of 30 CFR 700.5. That test asks first whether the facility is operated "in connection with" a mine, and secondly, whether it is "at or near the minesite." We find that this test is met in this case.

[1] The Hickory Tipple is operated in connection with two Wolverine mines. Wolverine owned, operated, and held the permit on the Hickory Tipple (Tr. 14). Wolverine also owned and operated one strip and one auger mine that together supplied 69 percent of the coal loaded through the facility (Applicant's Exh. 2; Tr. 25). In *Drummond Coal Co.*, 2 IBSMA 189, 87 I.D. 347 (1980) (*Drummond* II), we held that a processing facility is operated in connection with a surface coal mine within the meaning of 30 CFR 700.5 when the facility is owned and operated by the same company that owns and operates the mine or mines supplying most of the coal to that facility. There are no essential differences between the facts here and those in *Drummond II*. Therefore, we hold that the Hickory Tipple was operated in connection with the two Wolverine mines within the meaning of 30 CFR 700.5.[3]

[2] The Hickory Tipple is also near the two Wolverine mines. A the Board has noted, "near" is a relative term, depending for its interpretation on the circumstances of each case. In previous cases in which the Board considered processing facilities owned and operated in common with the mines supplying their coal, the Board has held that distances of 9 to 30 miles (*Drummond I*) and 7 to 15 miles (*Drummond II*) were at or near the minesite. The evidence in this case shows that the two Wolverine mines were 7 and 13 miles from the tipple (Applicant's Exh. 1). There is the same type of functional integration and common ownership in this case as in the two *Drummond* cases; thus, we hold that the Hickory Tipple was "near" those mines within the meaning of 30 CFR 700.5.

Because the Hickory Tipple is operated in connection with the two Wolverine mines and is near those mines, it is subject to regulation by OSM. The decision below is, therefore, reversed. Wolverine stipulated at the hearing that there were no sedimentation ponds at the tipple (Tr. 4). Since the evidence of a violation of the sedimentation pond requirements of 30 CFR 715.17(a) is undisputed, Notice of Violation No. 80–2–18–6 is sustained.

The June 6, 1980, decision below is reversed and Notice of Violation No. 80–2–18–6 is reinstated and sustained.

NEWTON FRISHBERG
Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

[3] As stated in *Drummond II*, *supra*, 2 IBSMA at 194 n.5, 87 I.D. at 349 n.5, the Board finds it irrelevant whether coal is transported from a mine to a preparation facility over public or private roads.

HARDLY ABLE COAL CO.

2 IBSMA 332

Decided *November 7, 1980*

Appeal by Hardly Able Coal Co. from an Apr. 25, 1980, decision of Administrative Law Judge David Torbett in Docket Nos. NX 9-109-R and NX 9-120-R, sustaining six violations contained in Notice of Violation No. 79-II-48-4 and sustaining Cessation Order No. 79-II-48-1 issued for failure to abate three of those violations.

Affirmed in part, affirmed as modified in part, and reversed in part.

1. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Specificity

When a notice of violation is issued on the basis of an alleged violation of a regulation, but the regulation was amended prior to the inspection, the notice may be sustained only if the condition cited clearly remains a violation under the amendments and is so stated that the permittee knows or should know the nature of the violation cited and the remedial action required.

2. Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: Generally—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Generally

When a permittee alleges that a violation of the effluent limitations of 30 CFR 715.17(a) occurred because of unusual precipitation conditions, under 30 CFR 715.17(a)(1) it bears the burden of demonstrating entitlement to an exemption from those limitations.

APPEARANCES: Roger W. Ayers, Manchester, Kentucky, for Hardly Able Coal Co.; Charles P. Gault, Esq., Office of the Field Solicitor, Knoxville, Tennessee, and Marianne D. O'Brien, Esq., Office of the Solicitor, Division of Surface Mining, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Hardly Able Coal Co. (Hardly Able) has sought review of that part of an Apr. 25, 1980, decision of Administrative Law Judge David Torbett that sustained six violations charged by the Office of Surface Mining Reclamation and Enforcement (OSM) in Notice of Violation No. 79-II-48-4 and that sustained Cessation Order No. 79-II-48-1 issued for failure to abate three of those violations. The notice and order were issued pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act).[1] For the reasons discussed below, we affirm that decision in part, affirm it as modified in part, and reverse it in part.

Background

On July 27, 1979, OSM inspected a mine on Hacker Branch in Owsley County, Kentucky, operated by Hardly Able under a deep mine li-

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. II 1978).

cense. On July 31, 1979, OSM issued Notice of Violation No. 79–II–48–4 to Hardly Able. That notice alleged 10 violations, 6 of which remain in dispute.[2] Those violations, as cited in Notice of Violation No. 79–II–48–4, are: No. 5, failure to revegetate promptly to stabilize the soil surface as required by 30 CFR 715.20(a)(2); No. 6, failure to remove all organic material from the disposal area before placing spoil or waste material in that area in violation of "30 CFR 715.15(b)(4)"; No. 7, failure to construct terraces to stabilize the face of the fill as required by "30 CFR 715.15(b)(8)"; No. 8, failure to construct stabilized surface channels off the fill to carry drainage away from the fill as required by "30 CFR 715.15(b)(9)"; No. 9, failure to post a permit identification sign in violation of 30 CFR 715.12(b); and No. 10, failure of the discharge from the silt dam to meet the effluent limitations of 30 CFR 715.17(a). On Aug. 15, 1979, OSM issued Cessation Order No. 79–II–48–1 for failure to abate violations 5, 6, and 9 of Notice of Violation No. 79–II–48–4.

Hardly Able applied for review of both the notice and order, and a hearing was held on Mar. 24, 1980. Violations 5–10 of the notice and the order were sustained in an Apr. 25, 1980, written confirmation of the ruling from the bench. Hardly Able appealed this portion of the decision and both parties filed briefs.

[2] Violations 2, 3, and 4 were vacated by OSM; violation 1 was vacated by the Administrative Law Judge and was not appealed to the Board.

Discussion and Conclusions

Violations 6, 7, and 8 cited Hardly Able for improper construction of a valley fill under the regulations of 30 CFR 715.15. Those regulations were amended on May 25, 1979. The amendments became effective on June 25, 1979.[3] The inspection in this case took place on July 27, 1979, and the notice of violation was issued on July 31, 1979. Both of these dates are after the effective date of the amended regulations. The notice, however, was written in terms of the old regulations. No one brought these amendments to the attention of either the Administrative Law Judge or the Board.

[1] In *Island Creek Coal Co.*, 2 IBSMA 125, 87 I.D. 304 (1980), the Board upheld a notice of violation that failed to cite the proper subsection of the regulations when the narrative portion of the notice gave a reasonably specific description of a violation and the operator did not claim confusion as to the nature of the alleged violation or the remedial action required. The question in this case, therefore, is whether the narrative description in the notice issued to Hardly Able described with such reasonable specificity conditions that remained violations under the amended regulations that Hardly Able was not or could not have reasonably been confused by the incorrect citation.[4]

[3] 44 FR 30628 (May 25, 1979).

[4] In *Grafton Coal Co., Inc.*, 2 IBSMA 316, 87 I.D. —— (1980), we held that the Administrative Law Judge had erred in vacating a notice of violation on the ground that it lacked reasonable specificity under sec. 521.

Violation 6 alleged that Hardly Able failed "to remove all organic material from the disposal area before placing material in the disposal area" in violation of "30 CFR 715.15(b)(4)." [5] The requirement to remove organic material from a fill area was moved from subsection (b)(4) to subsection (a)(3) by the amendment and the requirement now reads: "All vegetative and organic materials shall be removed from the disposal area * * *." Hardly Able did not dispute that organic material had been left in the fill, but instead introduced testimony that its officials felt that trees would help to stabilize the fill (Tr. 97). Because the narrative portion of the notice describes with reasonable specificity a violation of the regulations and because Hardly Able did not allege any confusion over that requirement, violation 6 of Notice of Violation No. 79–II–48–4 is sustained and the decision below on this violation is affirmed as modified by this discussion.

Violation 7 cited Hardly Able for "failure to construct terraces to stabilize the face of the fill as required by * * * 30 CFR 715.15(b)(8)." [6] Subsection (b)(8), which mandated the use of terraces, was removed in the May 1979 amendments. Subsection (a)(8) now states: "Terraces may be utilized to control erosion and enhance stability if approved by the regulatory authority and consistent with [the design and construction requirements of] Section 715.14(b)(2)." Under the amended regulations, therefore, the failure to construct terraces is no longer a violation in itself. Violation of the notice of violation is vacated and the decision below on this violation is reversed.

Violation 8 alleged that Hardly Able had failed "to construct stabilized surface channels off the fill to carry drainage away from the fill as required by * * * 30 CFR 715.15(b)(9)." OSM required Hardly Able "to construct stabilized surface channels off the fill to carry drainage away from the fill." [7] This subsection of the regulations was also deleted in the amendments. Although it is arguable that the requirements of subsection (b)(9) are still found in either subsection (b)(4) or subsection (d)(4), any replacement for that subsection is not clear and unambiguous. Furthermore, it appears that the amended regulations may have added new requirements. In *Island Creek*, *supra*, 2 IBSMA at 128, 87 I.D. at 305, we held that "[w]here regulations are complicated and remedies may be quite expensive, as is true under the Act, general guidance is not enough." It is not clear that the violation alleged remains a violation or what remedial action would be required to comply with the amended regulations. Therefore, violation 8 is vacated and the

F.N. 4—Continued
(a)(5) of the Act on his own motion when the parties expressed no confusion over the nature of the violation alleged. This case differs from *Grafton* in that here the conditions cited may no longer constitute violations because of the amendment to the regulations.

[5] Notice of Violation No. 79–II–48–4.

[6] *Ibid.*

[7] *Ibid.*

decision below on this violation is reversed.

[2] Violation 10 dealt with the failure of a discharge to meet the effluent limitations of 30 CFR 715.17 (a). Hardly Able did not dispute the fact of violation, but instead argued only that it had been a wet summer. OSM notes that the precipitation exemption to the effluent limitation is found in 30 CFR 715.-17(a)(1).[8] This regulation requires the permittee to demonstrate that the violation occurred because of a precipitation event at least as large as that specified in the regulation. Hardly Able failed to meet its burden of demonstrating entitlement to an exemption. The Administrative Law Judge's decision on violation 10 is affirmed.

Violations 5, revegetation, and 9, signs, raised factual questions that were decided against Hardly Able. We see no reason to disturb those findings and, therefore, affirm the decision below on these violations.

The Apr. 25, 1980, decision is affirmed as to violations 5, 9, and 10; affirmed as modified as to violation 6; and reversed as to violations 7 and 8 of Notice of Violation No. 79–II–48–4. The decision upholding Cessation Order No. 79–II–48–1 is affirmed.

NEWTON FRISHBERG
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

[8] This regulation was suspended on Dec. 31, 1979 (44 FR 77451). The summary published with the notice of suspension states that operations will still be subject to the effluent limitations of sec. 715.17(a), and that OSM will give exemptions from those limitations on the basis of EPA's revised precipitation event regulations found in 44 FR 76791 (Dec. 28, 1979). These regulations also place the burden of proving entitlement to an exemption on the operator.

ALASKA GATEWAY SCHOOL DISTRICT

5 ANCAB 111

Decided *November 12, 1980*

Appeal from the Decision of the Alaska State Office, Bureau of Land Management F–14943–B.

Dismissed.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

Where the Alaska Gateway School District claims only prospective ownership in lands and there is no evidence in the record that the School District has taken steps to obtain title pursuant to AS 14.08.151(b), the School District cannot be found to claim a property interest in such lands, within the meaning of 43 CFR 4.902, by reason of prospective ownership.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

While a "property interest" sufficient to confer standing under 43 CFR 4.902 need not be a vested interest, it may not be completely speculative.

APPEARANCES: Tim MacMillan, Esq., and Joe P. Josephson, Esq., Josephson & Trickey, for Alaska Gateway School District; Thomas E. Meacham, Assistant Attorney General, Office of the Attorney General, for State of Alaska; Michael W. Sewright, Assistant Attorney General, Office of the Attorney General, for State of Alaska, Depts. of Transportation and Education; Elizabeth S. Taylor, Esq., for Doyon, Limited; Elizabeth J. Barry, Esq., Office of the Regional Solicitor, for the Bureau of Land Management; James B. Gottstein, Esq., Goldberg & Gottstein, for Tanacross, Inc.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

On May 23, 1980, the Bureau of Land Management (BLM) issued its Decision, entitled, "Determination of Dual Core Township for Tanacross Incorporated Decision of September 14, 1976, vacated Decision of January 24, 1977, vacated." The BLM decided that T. 18 N. and T. 19 N., R. 11 E., Copper River meridian, are both considered to be core townships for Tanacross, Alaska. This decision dealt with the dual core township issue and did not decide on Tanacross, Inc.'s (Tanacross) land selection applications F–14943–B and F–19155–17; the decision on land conveyance is to be made at a future date.

On June 20, 1980, the appellant, Alaska Gateway School District, filed its Notice of Appeal from the decision of the BLM.

The appellant in its Statement of Reasons and Interest Affected, filed July 21, 1980, raises two issues:

> I The detemination by the BLM that Tanacross, Inc. is entitled to a dual township status is contrary to the law and not in accord with the facts.
>
> * * * * *
>
> II The Tok Dormitory site located in Township 18 North, Range 13 East, CRM, should be excluded from selection by Tanacross, Inc.

The appellant states that as a rural educational attendance area (REAA) it is authorized to operate public schools and provide educational services pursuant to Alaska law (AS 14.08.011, *et seq.*); it is entitled to acquire and own land (AS 14.08.151) and therefore has an interest in the land as a prospective owner.

AS 14.08.151, cited by the School District provides:

> (a) Except as provided in (b) of this section and § 161(g) of this chapter, the ownership of land and buildings used in relation to regional educational attendance area schools shall remain vested in the state, and use permits shall be given to the regional school boards.
>
> (b) A regional school board may, by resolution, request, and the commissioner of the department having responsibility shall convey, title to land and buildings used in relation to regional educational attendance area schools. If the state holds less than fee title to the land, the commissioner of the department having responsibility shall convey the entire interest of the state in the land to the regional school board. (§ 2 ch. 124 SLA 1975; am §§ 2, 3 ch 147 SLA 1978).

AS 14.08.161(g) provides:

> Title or sufficient interest determined acceptable by the department to an approved site for a school building to be constructed, repaired or improved by a regional school board shall be vested in the state or in the respective regional school board. (§ 3 ch 57 SLA 1976; am §§ 4, 5 ch 147 SLA 1978)

[1] While the appeal record shows that the legislature has appropriated funds for an athletic facility for acquisitiion pursuant to AS 14.08.161(g), the Alaska Gateway School District claims only prospective ownership pursuant to AS 14.08.151(b). There is no evidence in the record that the Alaska Gateway School District has taken steps pursuant to AS 14.08.151(b) for conveyance of title.

The BLM in its Answer states that "[t]he decision appealed from does not purport to convey any lands whatsoever, nor does it address the question of whether the dormitory site is 'public land' within the meaning of § 3(e) of ANCSA." The BLM also informs the parties that appellant's argument that the Tok Dormitory Site, in T. 18 N., R. 13 E., C.R.M., should be excluded from the selection of Tanacross, is premature; the issue will be ripe for appeal at such time as the BLM decides to approve or reject a Native selection of these lands.

Tanacross, in its Answer, filed Sept. 25, 1980, suggests that the appellant's appeal is premature because the BLM has not decided on lands conveyance and therefore should be dismissed

Doyon, Ltd., in its Answer, filed Oct. 3, 1980, moves the Board to dismiss the appellant for lack of standing required by 43 CFR 4.902.

The first question before the Board is whether or not the appellant had standing to appeal. The Board, on Sept. 30, 1980, issued an Order to Show Cause as to why this appeal should not be dismissed for lack of standing pursuant to 43 CFR 4.902. The order stated, in part:

> Because the decision of BLM appealed does not deal with lands at this time, because it is not clear whether the appellant is competing for interest in the land as a basis for standing to appeal, and because the appellant appears to claim only a prospective, rather than a present, interest in the disputed land, the Board hereby Orders the appellant to show cause, within ten (10) days from the date of this Order, why its appeal should not be dismissed at this time for lack of standing pursuant to 43 CFR 4.902.

On Oct. 10, 1980, appellant filed a motion to modify the Order to Show Cause by granting a time extension to Oct. 25, 1980. The motion was granted on Oct. 16, 1980. Appellant did not and has not responded to the Board's order.

[2] ANCAB, in *Appeal of State of Alaska*, 3 ANCAB 196, 217, 86 I.D. 225, 234 (1979) [VLS 78–42], in deciding on the question of standing to appeal, held that "[w]hile a 'property interest' sufficient to confer standing under [43 CFR] section 4.902 need not be a vested interest, it may not be completely speculative." It is the Board's conclusion that where the appellant's

"interest" in land is based only on prospective ownership at some future time, the appellant's "interest" is too speculative to constitute a "property interest" under 43 CFR 4.902.

Therefore, the Board concludes that the appellant, Alaska Gateway School District, lacks standing to bring this appeal, and the appeal is hereby dismissed.

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

REIMBURSEMENT FOR GEOLOGICAL AND GEOPHYSICAL DATA AND INFORMATION; EXXON'S PETITION TO REVISE 30 CFR PARTS 250, 251 AND 252

M-36924

November 17, 1980

Outer Continental Shelf Lands Act: Oil and Gas Information Program: Reimbursement

The U.S. Geological Survey has a right to look at all of a lessee's geological and geophysical data and information. If it keeps the lessee's copy, it must pay the lessee a reasonable sum for reproduction costs. In certain situations, the Survey must also pay the lessee a reasonable sum for processing geophysical data.

Outer Continental Shelf Lands Act: Oil and Gas Information Program: Secretary's Access to Data and Information

Sec. 26(a)(1)(A) applies to geological and geophysical data and information only. Other types of data and information are gathered under other sections of the Act.

Outer Continental Shelf Lands Act: Geological and Geophysical Exploration: Reimbursement

The U.S. Geological Survey must pay permittees reasonable reproduction costs for geological data and information submitted under sec. 26.

Outer Continental Shelf Lands Act: Oil and Gas Information Program: Secretary's Access to Data and Information

The Secretary may require permittees to ship data and information to him for review. If he then decides to keep them, he must pay the reimbursement required by sec. 26.

To: Secretary
From: Solicitor
Subject: Reimbursement for Geological and Geophysical Data and Information; Exxon's Petition to Revise 30 CFR Parts 250, 251 and 252

Exxon Co., U.S.A. has asked you to change several of the new rules governing activities on the Outer Continental Shelf (OCS). It claims that several of these rules violate the Outer Continental Shelf Lands Act, *as amended* (or "the Act)." Broadly speaking, the petition raises two issues of law. The first is the scope of the Oil and Gas Information Program in sec. 26 of the Act. The second is the legality of the rule allowing the Director, USGS, to order

permittees to ship data to him for his review.

Background

In 1978, after 5 years of study and debate, Congress amended the original Outer Continental Shelf Lands Act of 1953. In light of these amendments, the U.S. Geological Survey realized it would have to change some of the Department's regulations. It thus began the process of notice-and-comment rulemaking.

On Aug. 7, 1979, the Department published the first of a series of final rules. This was 30 CFR Part 252, entitled "Outer Continental Shelf Oil and Gas Information Program." 44 Fed. Reg. 46404 (Aug. 7, 1979). Next, the Department published sections of its revised regulations for oil, gas, and sulphur operations on the OCS. 44 Fed. Reg. 53686 (Sept. 14, 1979); 44 Fed. Reg. 61886 (Oct. 26, 1979); and later 45 Fed. Reg. 15128 (Mar. 7, 1980); and 45 Fed. Reg. 29280 (May 2, 1980). Finally, the Department published its revised rules for geological and geophysical explorations on the OCS. 45 Fed. Reg. 6338 (Jan. 25, 1980).

The oil and gas industry is unhappy with several of the new regulations. Exxon's petition challenges the legality of some of them.

Conclusions

Sec. 26(a)(1)(A) applies to geological and geophysical data and information only. Sec. 26(a)(1)(C) generally requires the Department to reimburse lessees and permittees when it keeps copies of this data and information. Both 30 CFR § 251.13 and 30 CFR Part 250 must be revised to provide the reimbursement required by § 26 of the Act.

The Secretary has authority under § 26(a)(1)(A) to regulate the method of his access to data and information. He may require lessees and permittees to ship them to him at their expense. After reviewing them, he may return them or may keep them. If he keeps them, he must pay the reimbursement required by § 26.

Analysis

I

Exxon's petition challenges six sections of Title 30, CFR, for their failure to comply with the reimbursement section of the 1978 Amendments. § 26(a)(1), 43 U.S.C. § 1352(a)(1). This section provides in part:

> Sec. 26. Outer Continental Shelf Oil and Gas Information Program.—(a)(1)(A) Any lessee or permittee conducting any exploration for, or development or production of, oil or gas pursuant to this Act shall provide the Secretary access to all data and information (including processed, analyzed, and interpreted information) obtained from such activity and shall provide copies of such data and information as the Secretary may request. Such data and information shall be provided in accordance with regulations which the Secretary shall prescribe * * *.
>
> (C) Whenever any data and information is provided to the Secretary, pursuant to subparagraph (A) of this paragraph—
>
> (i) by a lessee, in the form and manner of processing which is utilized by such lessee in the normal conduct of his business, the Secretary shall pay the reasonable cost of reproducing such data and information;

(ii) by a lessee, in such other form and manner of processing as the Secretary may request, the Secretary shall pay the reasonable cost of processing and reproducing such data and information;

(iii) by a permittee, in the form and manner of processing which is utilized by such permittee in the normal conduct of his business, the Secretary shall pay such permittee the reasonable cost of reproducing such data and information for the Secretary and shall pay at the lowest rate available to any purchaser for processing such data and information the costs attributable to such processing; and

(iv) by a permittee, in such other form and manner of processing as the Secretary may request, the Secretary shall pay such permittee the reasonable cost of processing and reproducing such data and information for the Secretary, pursuant to such regulations as he may prescribe * * *.

(b) (1) Data and information provided to the Secretary pursuant to subsection (a) of this section shall be processed, analyzed, and interpreted by the Secretary for purposes of carrying out his duties under this Act.

(2) As soon as practicable after information provided to the Secretary pursuant to subsection (a) of this section is processed, analyzed, and interpreted, the Secretary shall make available to the affected States, and upon request, to any affected local government, a summary of data designed to assist them in planning for the onshore impacts of possible oil and gas development and production. Such summary shall include estimates of (A) the oil and gas reserves in areas leased or to be leased, (B) the size and timing of development if and when oil or gas or both, is found, (C) the location of pipelines, and (D) the general location and nature of onshore facilities * * *.

Sec. 26 is not the only section of the Act allowing the Secretary to gather information. Under sec. 604, 43 U.S.C. § 1863, the Secretary can gather information on how well lessees are giving minorities and women equal opportunity in employment and contracts. Under sec. 18(g), 43 U.S.C. § 1344(g), he may obtain any information "which may be necessary to assist him in preparing any environmental impact statement and in making other evaluations [under the Act]." Under sec. 5, the Secretary has always had the authority to get information from lessees whenever it is "necessary and proper" to help him prevent waste, conserve natural resources, and protect correlative rights on the Outer Continental Shelf. 43 U.S.C. § 1334 (a). Thus, the authors of the Conference Committee report were speaking loosely when they said that "Section 26 describes the procedures for obtaining and releasing information from lessees and permittees." S. Rep. No. 95–1091, 95th Cong., 2d Sess. 119 (1978). Sec. 26 merely regulates how the Secretary gathers and releases the data and information described in sec. 26(a).

The text and legislative history of this section convince me that Congress is referring only to geological and geophysical data and information. Other types of scientific data are gathered under other sections of the Act. I do not reach this conclusion easily but only after weighing the statutory language of,

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and the purposes behind, the Oil and Gas Information Program.

I start with the language of the statute itself. Sec. 26(a)(1)(A) gives the Secretary the right to look at "all data and information (including processed, analyzed, and interpreted information)" which lessees and permittees gather from exploring for, developing, and producing oil or gas on the OCS. Traditionally, of course, the oil and gas industry has been chiefly interested in gathering information on the rock strata underground. Industry makes its money from finding, producing, and selling oil and gas; so it depends on geological and geophysical information for its livelihood. But industry does gather other information in the course of its activities. At first glance, sec. 26 might seem to include all these types of information. But nothing in the legislative history supports such a reading.

The idea of an OCS Oil and Gas Information Program first appeared in the proposed Energy Supply Act of 1974. That proposal would have added a new sec. 19, entitled Federal Outer Continental Shelf Oil and Gas Survey Program, to the original OCS Lands Act:

> SEC. 19. (a) The Secretary is authorized and directed to conduct a survey program regarding oil and gas resources of the Outer Continental Shelf. This program shall be designed to provide information about the probable location, extent, and characteristics of such resources in order to provide a basis for (1) development and revision of the leasing program required by section 18 of this Act, (2) greater and better informed competitive interest by potential producers in the oil and gas resources of the Outer Continental Shelf, (3) more informed decisions regarding the value of public resources and revenues to be expected from leasing, and (4) the mapping program required by subsection (c) of this section * * *.
>
> (h) The Secretary shall, by regulation, require that any person holding a lease issued pursuant to this Act for oil or gas exploration or development on the Outer Continental Shelf shall provide the Secretary with any existing data (excluding interpretation of such data) about the oil or gas resources in the area subject to the lease. The Secretary shall maintain the confidentiality of all proprietary data or information until such time as he determines that public availability of such proprietary data or information would not damage the competitive position of the lessee.

S. Rep. No. 93–1140, 93rd Cong., 2d Sess. 114–15 (1974).

A comparable provision appeared in the 94th Congress' proposed Outer Continental Shelf Management Act of 1975, Senate Bill 521. S. Rep. No. 94–284, 94th Cong., 1st Sess. 86–87 (1975). The Committee report accompanying the bill noted:

> * * * that the government must have better information about the resources it owns than it has had in the past * * *. Subsection 19 provides that any person holding an oil or gas lease shall provide the Secretary with any existing data (excluding interpretation of such data) about the oil or gas resources in the area subject to the lease * * *. The Committee does not intend that this provision be applied to leases issued before enactment of S. 521. *Id.* at 26–27.

Senate Bill 521 changed the title of proposed sec. 19 to "Federal Outer Continental Shelf Oil and Gas Information Program." It also

hanged the fourth purpose of the rogram: the mapping program as dropped in favor of "assisting tate and local government agenies in assessing the likely impacts f the development of such public esources." *Id.* at 86.

The current scheme for sec. 26 did ot appear until 1976 in the House's roposed Outer Continental Shelf ands Act Amendments of 1976. H. Rep. No. 94–1084, 94th Cong., d Sess. 23–25 (1976). The proposed 26 differed from its Senate predcessor in three respects. First, it dropped the four specific purposes f the Information Program and, nstead, directed the Secretary to rocess, analyze, and interpret the lata and information "for purposes f carrying out his duties under this ct." *Id.* at 24. Second, it required he Secretary to pay reproduction osts and some reprocessing costs; he Senate version had required either. Third, it applied to both essees and permittees and included nterpreted information; the Senate ersion had been limited to lessees nd did not include interpreted information.

This third difference is especially significant. It suggests that when Congress said "all data and information" in § 26(a)(1)(A), it was responding to the more limited Senate version. In other words, Congress wanted the Secretary to get all data and information *about the oil and gas resources* of the OCS. This reading of sec. 26 is borne out by other evidence in the legislative history.

First, members of Congress who commented on § 26 almost always did so when discussing oil and gas resources. For example, the House debates on July 21, 1976, produced the following exchange:

> **Mr. Seiberling: * * * The question is whether only the big oil companies, who can afford it, are going to do all the exploratory drilling and then keep the results close to the chests * * *. Not only should the United States have as much information as the bidders, but all bidders should have the same basic information * * *.**
>
> **Mr. Bell: Does not the United States now have that information? * * ***
>
> **Mr. Seiberling: They do not have it * * *.**
>
> **Mr. Bell: * * * Under section 26 of this bill, that provides the Government with this information * * *.**

122 Cong. Rec. 7479 (July 21, 1976). Later, Representative Fish objected to language in proposed sec. 506 [now § 606] which stated that the government lacked basic energy information (such as estimates of oil and gas reserves).

> **Rep. Fish: * * * I think what it says is totally erroneous and misleading. Mr. Chairman, would the gentleman turn to [proposed § 26(b)] * * *. I think we have all the information we need today.**

124 Cong., Rec. 594 (Feb. 2, 1978). Still later, Representative Dingell pointed out that nothing in sec. 26, "or in other information-gathering provisions of the OCS Act, * * * affect the authorities of the Secretary of Energy or the Federal

Energy Regulatory Commission to collect * * * energy data * * *." 124 Cong. Rec. 8882 (Aug. 17, 1978). Most persuasive, however, is the remark of Representative Murphy, chairman of the 1978 Conference Committee on the proposed Act and sponsor of the House version. "[Sec. 26 provides] for an information program in order to assess the Nation's OCS oil and gas resources so that the Government will receive a true value for those resources." The only remark suggesting that § 26 (a)(1)(A) might be broader is Representative Fish's:

> Our amendment [to § 26] sets forth the scope of information to be made available and the way to [sic, it?] will be passed along. Under the amendment, states will, for the first time, receive all the information they need to effectively carry out their constitutional police power functions * * *.

122 Cong. Rec. 5327 (June 4, 1976). But here we must remember that § 26(a)(2) gives the Secretary another source of information: other federal agencies. Sec. 26 does not draw solely on lessees and permittees. Thus, Representative Fish's remark sheds little light on the problem. In any event, I can find no specific evidence in these remarks that § 26(a)(1)(A) applies to anything other than geological and geophysical data and information.

Second, Representative Murphy prepared a chart for the Congressional Record, in which he compared existing agency regulations with the proposed House bill. His purpose was to prove that the bill did not create a "regulatory nightmare." I think it significant that he found § 26 comparable to two existing rules only: those giving the Secretary access to certain types of geological and geophysical data and information. See 122 Cong. Rec. 5326 (June 4, 1976).

Consequently, I conclude that § 26 (a)(1)(A) applies to geological and geophysical data and information only. But our journey is not over. Exxon's petition claims in effect that the Department must reimburse companies under § 26 whenever it gathers this data and information. In other words, the Department's reason for gathering the information is irrelevant under § 26.

Traditionally, the Department has required industry to submit this information for two purposes. The first is to assure that operators are conducting safe drilling operations. The second is to evaluate the oil and gas resources of the OCS. As we have seen, the legislative history of § 26 suggests that Congress was interested more in the second purpose. Sec. 26(b), however, cannot be read so narrowly. Although the original version of the Information Program did have four limited purposes, the enacted version does not. It refers generally to the Department's duties under the Act. Furthermore, Representative Murphy's chart of § 26 included § 250.95 of the regulations, a rule serving both purposes. See 122 Cong. Rec. 5326 (June 4, 1976). The principle of sec. 26(b) is broad enough to en-

compass both purposes. Generally then, anytime the Department asks for and keeps copies of geological or geophysical data and information, it must pay reasonable reproduction costs. In certain situations, it must also pay processing costs, as described in § 26(a)(1)(C). 43 U.S.C. § 1352(a)(1)(C).

The six challenged regulations all appear to allow the Geological Survey to ask for geological and geophysical data and information. See 30 CFR §§ 250.12(d), 250.34–1(k) and –2(n), 250.39, 250.40 (assuming that directional surveys are geological information), 250.95, and 251.13. As a general proposition, sec. 26(a)(1)(C) applies to all these sections. The Department must amend § 251.13 and must add a new reimbursement section to 30 CFR Part 250. In redrafting the regulations, however, the Department may find that the application of sec. 26 to certain matters will lead to a result not intended by Congress. I will review these cases whenever they arise.

II

Exxon's petition also argues that § 251.12(b) goes beyond the requirements of sec. 26 of the Act. Under this regulation, the Director may request a permittee to deliver data or information to the Regional Office for inspection. If the Director then chooses to keep the data or information, he must reimburse the permittee for reproduction and processing to the extent required by § 26(a)(1)(C). But if the data and information do not help the Director, he may send them back to the permittee. The permittee pays the cost of shipping the data or information to the Regional Office, and the USGS pays the cost of shipping it back.

The Director's alternative is to send a representative to the permittee's office to inspect the data or information, where the Director's representative would look at the same documents or printouts that the Director can request under § 251.12(b). Ordinarily, this method of access is convenient. However, if the documents to be reviewed are numerous, the representative might need several days to inspect them. The representative would have to be fed, lodged, and transported at public expense. The permittee, on the other hand, would still have to pay its employees to gather the documents for inspection, and would still have to pay to have the documents printed out of the computer or other tape. From the permittee's point of view, the only real difference between these two methods is that, under the first method, the permittee has to pay one-way shipping costs.

Sec. 26(a)(1)(A) requires permittees to "provide the Secretary access to all data and information * * * obtained from such [exploration] activity and shall provide copies of such data and in-

formation as the Secretary may request. Such data and information shall be provided in accordance with regulations which the Secretary shall prescribe." Thus, the issue is this: given that the Secretary has the authority to regulate the manner in which he may have access to this data and information, is it unreasonable for him occasionally to ask permittees to pay one-way shipping costs? It is not. Shipping costs are small by any standard. The burden that this requirement places on permittees is minimal. Sec. 251.12(b) is a reasonable exercise of the Secretary's authority.

I also note that Congress incorporated part of the Department's existing reimbursement rule in § 26(a)(1)(C). See S. Rep. No. 95–1091, 95th Cong., 2d Sess. 119 (1978). This rule, 30 CFR § 251.13 (b), did not reimburse permittees for shipping costs. See Assistant Solicitor Ferguson's unpublished memorandum of Dec. 2, 1976. Congress obviously has entrusted this little matter to the Secretary's discretion.

III

One question needs only brief discussion. Exxon claims that 30 CFR §§ 251.11 and 251.12 place an unreasonable burden on permittees to notify the Director of the acquisition, analysis, processing, or interpretation of geological or geophysical data collected under the permit. Exxon apparently is worried that this rule requires it to give the Director minute-by-minute, datum-by-datum notice of changes in processing or interpretation. Sec. 26 gives the Secretary broad access to this information, but the use of the authority must be subject to a rule of reason.

I am told that the Survey does not mean to require continual notification as each new thought pops into the permittee's head.

Now that the Survey has formed its position, it would be a good idea to rewrite the rules so that they accurately explain what permittees must do.

CLYDE MARTZ,
Solicitor.

TOLLAGE CREEK ELKHORN MINING CO.

2 IBSMA 341

Decided *November 24, 1980*

Appeal by Tollage Creek Elkhorn Mining Co. from a Jan. 31, 1980, decision of Chief Administrative Law Judge L. K. Luoma upholding the issuance of a notice of violation for failure to restore an area to approximate original contour with all highwalls eliminated. Docket No. NX 0–30–R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination—Surface Mining Control and Reclamation Act of 1977: Roads: Generally

In a steep slope mining operation all highwalls must be completely backfilled after mining is concluded, even where

retention of an access road has been approved as part of a postmining land use.

2. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally

Compliance with state mining permit conditions does not excuse noncompliance with the initial Federal performance requirements.

3. Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

The requirement of sec. 505(b) of the Act, 30 U.S.C. § 1255(b) (Supp. II 1978), that the Secretary of the Interior set forth any state law or regulation which is construed to be inconsistent with the Act does not impose the obligation on the Secretary of designating every state interpretation of state law which might be inconsistent with Federal law.

APPEARANCES: Charles J. Baird, Esq., Baird and Baird, Pikesville, Kentucky, for Tollage Creek Elkhorn Mining Co., for intervenor Oscar W. Thompson, Jr., and for amicus curiae Coal Operators & Associates, Inc.; Robert S. More, Esq., Office of the Field Solicitor, Knoxville, Tennessee, Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Tollage Creek Elkhorn Mining Co. (Tollage Creek) has appealed from a Jan. 31, 1980, decision of Chief Administrative Law Judge L. K. Luoma upholding the issuance of Notice of Violation No. 79–2–66–31 which charged Tollage Creek with failure to restore the land to its approximate original contour with all highwalls,[1] spoil piles, and depressions eliminated in violation of sec. 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977 (Act).[2] For the reasons set forth below, we affirm.

Procedural and Factual Background

On Nov. 7, 1979, an Office of Surface Mining Reclamation and Enforcement (OSM) inspector visited Tollage Creek's surface coal mining operation in Pike County, Kentucky, and issued Notice of Violation No. 79–2–66–31. The notice charged a violation of 30 U.S.C. § 1265(b)(3) (Supp. II 1978) for "[f]ailure to restore to the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated."[3] On Nov. 19, 1979, Tollage Creek filed an ap-

[1] Highwall is defined in 30 CFR 710.5 as: "[T]he face of exposed overburden and coal in an open cut of a surface or for entry to an underground coal mine."

[2] Act of Aug. 3, 1977, 91 Stat. 445, 486, 30 U.S.C. § 1265(b)(3) (Supp. II 1978).

[3] The area in question concerned about 500 feet of highwall. Approximately an additional 5,000 feet of exposed highwall remained on the operation but Tollage Creek was not required to eliminate it (Tr. 148). It had been created by Tollage Creek's mining operation prior to Dec. 31, 1978, pursuant to a small operator exemption received by Tollage Creek in accordance with 30 CFR 710.12.

plication for temporary relief. At the hearing held on Dec. 19, 1979, the Chief Administrative Law Judge considered the application for temporary relief also to be an application for review. In the Jan. 31, 1980, decision the validity of the notice was upheld.[4] Tollage Creek filed a timely notice of appeal. Subsequently, the Board granted Oscar W. Thompson, Jr., leave to intervene and granted Coal Operators & Associates, Inc., amicus status. All briefs have been submitted.

Thompson is the surface owner of the entire Tollage Creek watershed in Pike County, Kentucky, consisting of 600 to 800 acres. He and his daughter maintain the only residences in the hollow. The Chief Administrative Law Judge made the following statement of facts (Decision at 3–4):

Since 1964, Dr. Thompson has contacted several Governmental agencies concerning the feasibility of establishing a tree farm or commercial forest, however, he could not afford building the access roads and fire breaks necessary for a successful tree farm. He had the area timbered in 1968 by a lumber company and was dissatisfied with the results. The company which did the timbering had no feasible access to the trees and used a small bulldozer to go up and down the mountain to harvest the marketable trees. As a result of this timbering, there was significant damage to the property, including soil erosion. The owner stated he would not again consider the use of this method of timbering.

In 1974 the owner began negotiations with applicant concerning development of the property. The owner had been approached by several other coal operators, but had denied the use of his surface to these other operators because he was not satisfied with their methods of reclamation. The applicant and the surface owner reached an agreement which provided that the applicant could surface mine the property if usable access roads were left to allow postmining use of the land.

On July 13, 1979, the Bureau of Surface Mining Reclamation and Enforcement of the Commonwealth of Kentucky issued applicant a "Surface Disturbance Mining Permit."[5] The permit granted a vari-

[4] The Chief Administrative Law Judge stated at p. 6:

"Under the terms of the Act, I am forced to conclude that the notice of violation was validly issued. Such a finding, however, points up a basic flaw of the Act. Sections of the Act allow flexibility in requirements that land be restored to approximate original contour so that access roads can be built to facilitate postmining uses of the land, yet these same sections specifically state that all highwalls must be eliminated. In the present situation, however, an access road which would allow for postmining use of the land is difficult, if not impossible to construct unless some part of the highwall is left exposed. Further, retention of the highwall causes no damage to the environment. No allegations of environmental damage were made and no evidence of such was produced. In effect, this is such a situation where retention of the highwall should be allowed because its elimination will result in the consequent difficulty of access for valuable postmining use of the land. The situation is so unfair that it cries for legislative relief."

[5] Tollage Creek filed an application seeking a revision of Surface Disturbance Mining Permit No. 6483–77 (New No. 298–0911). The application contained the access road proposal. On Apr. 6, 1979 the Director of the Division of Permits for the Kentucky Bureau of Surface Mining Reclamation and Enforcement denied the application. Tollage Creek appealed the denial. On May 10, 1979, a hearing officer for the Commonwealth of Kentucky held a hearing and on June 21, 1979, he issued a recommended decision concluding that the road in question was in fact an access road and that an access road necessary to support a postmining land use is exempt from restoration to approximate original contour under the Kentucky definition of that term (Exh. A–1). The hearing officer's decision was approved by the Secretary, Kentucky Department for Natural Resources and Environmental Protection, on July 11, 1979 (Exh. A–2).

ance allowing a haul road to be constructed concurrently with backfilling operations. The permit further provided that only the attendant highwall which is represented in the approved plan, and is necessary to maintain the stability of the backfill and provide access for the postmining land use, would be allowed to remain. Subsequent to the issuance of the permit, applicant began mining operations in a manner consistent with the permit issued by the State. * * *

Provisions in permit applications submitted to the State which contain a postmining land use program are something of a rarity. In preparing the permit application, applicant's engineer performed a stability analysis regarding the placement of the road on the fill. Three separate positions were analyzed for stability, one being at the top of the fill, another being in the middle of the fill, and the third being at the bottom of the fill on the solid bench. The engineer stated that in computing the factor of safety of the fill, with the road in each of these three positions, only the road at the top of the fill resulted in a factor of safety greater than 1.5. On top of the fill the factor of safety for the road and fill area was 1.719. With the road in the middle of the fill, the factor of safety was 1.314 and at the bottom of the fill, the factor of safety was 1.079.

* * * * *

Respondent's inspector testified that leaving the highwall would cause no environmental damage and that, if an access road were to be constructed, he could think of no better site other than its present location.

Appellant's engineer testified that from a hydrological viewpoint it would be environmentally superior to have the road at the top of the fill rather than in the middle or at the bottom (Tr. 162). He stated that because of the company's method of operation the highwall is uniform and stable (Tr. 125). He indicated that under the company's plan the coal seams will be completely covered and any toxic material will be buried by at least 4 feet of nontoxic material (Tr. 141). A recognized expert on slope stability stated that the best location for a road at this site from the standpoint of stability and control of surface drainage would be at the top of the fill (Exh. A–16).

Discussion

Appellant was charged with violating sec. 515(b)(3) of the Act, 30 U.S.C. § 1265(b)(3) (Supp. II 1978). That section reads:

(b) General performance standards shall be applicable to all surface coal mining and reclamation operations and shall require the operation as a minimum to—

* * * * *

(3) except as provided in subsection (c) of this section with respect to all surface coal mining operations backfill, compact (where advisable to insure stability or to prevent leaching of toxic materials), grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depression eliminated. [*]

The implementing regulation, 30 CFR 715.14, states:

In order to achieve the approximate original contour the permittee shall, except as provided in this section, transport, backfill, compact (where advisable to ensure stability or to prevent leaching of toxic materials), and grade all spoil ma-

* Subsec. (c) provides for an exception to the approximate original contour standard for mountaintop removal operations. Tollage Creek was involved in a steep slope operation.

terial to eliminate all highwalls, spoil piles, and depressions.[7]

[1] Appellant argues that the regulations specifically allow for retention of a highwall which is a part of an approved postmining land use. It alleges that 30 CFR 715.17(*l*)(1) creates the exception and that 30 CFR 715.14 is not applicable to the circumstances of this case in which retention of a road is approved as part of a postmining land use.[8] If only read against 30 CFR 715.14, 30 CFR 715.17(*l*)(1) might be interpreted as creating an exception to highwall elimination; however, one of the special performance standards applicable to steep slope mining, 30 CFR 716.2(b), specifically requires that the highwall shall be completely covered with spoil.[9] Attempting to give effect to all sections of the regulations, it appears that the language relied on by appellant in 30 CFR 715.17(*l*)(1) more clearly refers only to the requirement in 30 CFR 715.14 that lands be returned to approximate original contour.[10] Even the variance provisions of sec. 515(e)(1), 30 U.S.C. § 1265(e)(1) (Supp. II 1978), which are applicable only in the permanent regulatory program,[11] merely allow a variation from approximate original contour; the highwall is specifically required to be eliminated.[12] Thus,

[7] Sec. 515(e), 30 U.S.C. § 1265(e) (Supp. II 1978), allows for limited variances of the approximate original contour requirement. OSM interpreted that section as not having effect during the initial regulatory program. However, OSM published proposed rules in the *Federal Register*, 44 FR 61312 (Oct. 24, 1979), implementing a variance procedure during the initial regulatory program. Those rules have not been finalized. The preamble to the rules indicated that even if a variance from approximate original contour were available, complete backfilling of the highwall would be necessary. It was stated at 61313:

"Finally, proposed § 716.2(e)(4)(1) would require that the highwall be completely backfilled with spoil to achieve a static safety factor of at least 1.3. This two-pronged requirement is drawn from section 515(e)(1) of the Act which OSM reads to say that even where a variance is granted, complete backfilling and achieving stability are mandatory."

[8] 30 CFR 715.17(*l*)(1) states in pertinent part:

"All access and haul roads shall be removed and the land affected regraded and revegetated consistent with the requirements of § 715.14 and § 715.20, unless retention of a road is approved as part of a postmining land use under § 715.13 as being necessary to support the postmining land use or necessary to adequately control erosion and the necessary maintenance is assured."

[9] 30 CFR 716.2 reads:

"The permittee conducting surface coal mining and reclamation operations on natural slopes that exceed 20 degrees, * * * shall meet the following performance standards.

* * * * *

"(b) The highwall shall be completely covered with spoil and the disturbed are a [*sic*] graded to comply with the provisions of § 715.14 of this chapter."

The area in question in this case has a slope of 32 degrees.

[10] This interpretation is supported by language in the preamble to the initial program regulations addressed to comments on 30 CFR 715.14, comment 10, 42 FR 62644 (Dec. 13, 1977):

"10. A limited number of comments recommended retention of portions of the highwall. The recommendation was not accepted since the Act and the legislative history indicate that no highwalls are to be left after mining is completed. Highwall elimination is mandated in § 515(b)(3) of the Act as is attainment of the 'lowest practicable grade' in cases of inadequate overburden to fully grade to approximate original contour. Return to the 'appropriate original contour' to 'cover completely the highwall' is required in § 515(d) of the Act for steep slope areas."

[11] *See* n.7, *supra*.

[12] The following statement relative to the variance provision of sec. 515(e)(1) is contained in the legislative history of the Act, H.R. Rep. No. 493, 95th Cong., 1st Sess. 108–109 (1977):

"The Senate amendment provided a variance to the approximate original contour and

the conclusion is inescapable that in a steep slope mining operation such as the one in this case, all highwalls, regardless of their purpose, must be completely backfilled.

[2] Appellant argues that the variance granted by Kentucky was part of its state mining permit and that the condition cited in the notice issued by OSM was one specifically allowed by its permit. However, compliance with state mining permit conditions does not excuse noncompliance with the initial Federal performance requirements. *Alabama By-Products Corp.*, 1 IBSMA 239, 86 I.D. 446 (1979); *Cedar Coal Co.*, 1 IBSMA 145, 86 I.D. 250 (1979). Appellant attempts to distinguish these cases by pointing out that both involved permits issued prior to the date of the initial program regulations (December 13, 1977), while Tollage Creek's permit was issued on July 13, 1979. However, this fact gives appellant less of a claim to a shield from Federal regulation than may have been made in the other cases.[13] Clearly, those cases are controlling herein.[14] Although appellant's state permit contained language allowing part of the highwall to remain in the area in question, Federal law requires the elimination of all highwalls and there is no provision for a variance from that requirement. In fact, sec. 502 (b) of the Act, 30 U.S.C. § 1252(b) (Supp. II 1978), sets forth that a state permit shall contain terms requiring compliance with Federal performance standards. Those standards include the restoration of approximate original contour and the elimination of all highwalls.

[3] Appellant also contends that OSM is estopped from asserting

backfilling highwalls completely for a wide range of post mining land uses. In addition, if 'sound engineering technology' indicated that the highwall could not be completely backfilled, then the operator would have been required to reduce the highwall to the maximum extent consistent with 'sound engineering technology' and develop a revegetation plan that is 'reasonably calculated' to screen the remaining highwall within 5 years. H.R. 2 included no such provisions.

"Conferees agreed on a modified variance to the approximate original contour standard which requires that all highwalls are to be completely backfilled in every instance. This amounts to a variance from the 'configuration' aspects of the regrading standard [See the definition, Sec. 701(2)]. This gives an opportunity for a broad range of postmining land uses on those operations which would result in a very wide bench accommodating both the stable and complete backfilling of the highwall as well as additional areas for the planned land uses. Conferees did not adopt the 'sound engineering technology' provision of S.7." (*Emphasis* added.)

[13] Sec. 502(b) of the Act, 30 U.S.C. § 1252 (b) (Supp. II 1978), provides that on and after May 3, 1978, all surface coal mining operations on lands on which such operations are regulated by a state must comply with certain performance standards of the Act.

[14] Appellant states that the holdings in *Cedar* and *Alabama By-Products* are contrary to two United States district court decisions involving similar circumstances, *Midland Coal Co.* v. *Andrus*, No. 79–112 (C.D. Ill., Dec. 21, 1979) (order granting preliminary injunction) and *Star Coal Co.* v. *Andrus*, No. 79–171–2 (S.D. Iowa, Feb. 13, 1980) (order granting preliminary injunction). Both decisions were appealed by the Secretary. Neither of those decisions require vacation of the notice in this case. The facts in those cases were very different from this situation. Both involved state determinations granting exemptions from prime farmlands requirements. There was no question that the states had the authority to grant such exemptions. The Secretary merely disagreed with the determinations. Here, Kentucky had no authority to grant a variance from the Federal requirement of complete highwall elimination.

the alleged violation because of the failure of the Secretary to designate an inconsistent state law as required by sec. 505(b) of the Act, 30 U.S.C. § 1255(b) (Supp. II 1978).[15] As pointed out by appellant, this section was intended to insure against any confusion concerning which statutes in a state would be applicable and which would not.[16] Appellant alleges that it was error for the Chief Administrative Law Judge to find no inconsistency. Appellant argues that there is a very significant difference in the definition of approximate original contour under Federal law and under Kentucky law, and that the Kentucky hearing officer relied on the difference language in the Kentucky law in concluding that it was not necessary to completely backfill and eliminate a highwall for an approved postmining land use.[17] We do not find this argument persuasive. The Act requires the Secretary to designate inconsistent state laws. That necessarily requires the designation of laws which are on their face inconsistent. The Kentucky definition of approximate original contour cited by appellant is not on its face inconsistent with Federal law. Although the Kentucky hearing officer apparently interpreted the language of the state definition of approximate original contour as allowing partially exposed highwalls to remain, the Secretary cannot be responsible for designating every state interpretation of state law which might be construed in a manner inconsistent with Federal law. Since the state is responsible for issuing permits which are consistent with Federal requirements, the state must assume the burden of conforming it permits to Federal standards during the initial program.

It is with difficulty that we have reached the result in this case. Common sense and fairness would appear to require an opposite result. The Federal law seems inescapable, however. Had Congress been presented with the factual situation herein, where elimination of the highwall would not benefit the environment but only burden the operator or landowner, it may have provided in the Act for some exception to the rigid backfilling requirement. Apparently, it was not. Clearly, it did not. We are con-

[15] That section provides in pertinent part: "The Secretary shall set forth any State law or regulation which is construed to be inconsistent with this Chapter."

[16] S. Rep. No. 128, 95th Cong., 1st Sess. 73–74 (1977).

[17] The Kentucky definition, KRS § 350.010 (14), reads:

"'Approximate original contour' means that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads (when not necessary to support its approved postmining use), closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwall and spoil piles eliminated."

The definition in the Act, 30 U.S.C. § 1291 (2) (Supp. II 1978) is:

"'[A]pproximate original contour' means that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to the mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated."

strained to affirm the Chief Administrative Law Judge.[18]

Appellant has also raised constitutional issues which are beyond the authority of this Board to decide.

The decision appealed from is affirmed.

NEWTON FRISHBERG
Administrative Judge

CHIEF ADMINISTRATIVE JUDGE IRWIN CONCURRING:

A. P. Herbert's remarks are apt in this case:

> There is an old and somewhat foolish saying that "Hard cases make bad law," and therefore the law must be left as it is. It would be equally true to say, "Bad law makes hard cases," and therefore the law must be amended. The real truth lies somewhere between. Mere freaks of fortune should not be made an excuse for weakening a law which is sound. But a law which is seen to multiply hard cases, not through any accident but by its necessary elements, is not worth preserving, for the law was made for man, not man for the law.[1]

It is not for us to comment on the wisdom of the law, implemented in the Secretary's regulations, that highwalls be eliminated. It is for us to interpret and apply the law. And the law is clear even though its application in this case may be feckless. If its application is seen to multiply hard cases, presumably the Congress will amend it. But that is not our province.[2] The decision of the Chief Administrative Law Judge must be affirmed.

The dissent's suggestion that we should have modified the notice of violation in this case to eliminate any requirement to remove the highwall in question is, in my view, disingenuous.[3] The remedial action prescribed in the notice of violation was to "restore to the approximate original contour of the land with all highwalls, spoil piles and depressions eliminated."[4] Whatever may be the scope of authority in sec. 525(b), 30 U.S.C. § 1275(b) (Supp. II 1978), to modify a notice of violation or cessation order, it cannot include a modification that negates provisions of the law that

[18] This result would not appear to deprive the surface owner of his postmining land use. At the hearing appellant's engineer indicated that if sufficient funds were expended, an access road with a proper stability factor could be constructed with complete highwall elimination (Tr. 161–162).

[1] Herbert, *Uncommon Law* (New York, 1936) at 274. Justice Jackson's statement is also apropos: "We agree that this is a hard case but we cannot agree that it should be allowed to make bad law." *American Communications Comm.* v. *WOKO*, 329 U.S. 223, 229 (1946).

[2] As Justice Miller said in *United States* v. *Lee*, 106 U.S. 196, 220 (1882):

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.
>
> "It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives."

[3] Not unlike Joab, who touched his brother Amasa's beard with his right hand, as though to kiss him, but shed his bowels to the ground with the blow of a sword held in the left. 2 *Samuel* 30:9–10. *See also*, 1 *Kings* 2:29–32.

[4] Exh. R–1. This, of course, parallels the language of sec. 515(b)(3) of the Act, 30 U.S.C. § 1265(b)(3) (Supp. II 1978).

are mandatory, as we have concluded those in this case are.

WILL A. IRWIN
Chief Administrative Judge

ADMINISTRATIVE JUDGE MIRKIN PARTIALLY DISSENTING:

While I join with my colleagues in holding that the notice of violation was properly issued, I am mystified that, instead of using the tools that have been given us to rectify situations that defy "common sense and fairness" (p. 576, *supra*), or that constitute "feckless" applications of the law (p. 577, *supra*), one says Congress prevents the corrections and the other says that Supreme Court Justice Miller, deceased, will not permit it. So, while deploring the result, they affirm it.[1] It is not, however, the responsibility of either Congress or the late Justice Miller that common sense and fairness are here being debased by fecklessness. That is a result of action by this Board.

It is obvious that Congress believed that highwalls per se constitute environmental insults and that the only measurement required by the regulators would be one that determines the existence of highwalls rather than one that would determine actual harm from highwalls.[2] This is not a situation that "cries for legislative relief" (p. 572 n.4, *supra*). Even to suggest that the Secretary must go through the elaborate rulemaking process or that Congress must solemnly amend the Act in order to correct a perceived injustice to a single individual, whose situation defies literal duplication, amounts to a grotesquerie. This Board should not construe the law or its own powers in a manner so as to render it merely a checkpoint on the way to the courts who, because of our default, may become the real administrators of the program.[3]

The Board is authorized to modify enforcement actions. 30 U.S.C. § 1275(b) (Supp. II 1978); 43 CFR 4.1101(b); 43 CFR 4.1275. That we possess such a power is not to say that we should employ it indiscriminately; but where failure to use it results in a miscarriage of justice, we should not hesitate to utilize it. 43 CFR 4.1101(b). I cannot imagine a situation that would qualify more for intervention by us than this one.

The record discloses that no public interest would be served by requiring Tollage Creek to take the remedial action (elimination of the highwall) required by OSM. Thompson, the landowner, wants to develop a commercial forest on his land. As a preliminary to this project arrangements were made to have some of the land stripped of coal by

[1] Not unlike Lewis Carroll's walrus who wept at the deaths of the oysters he had invited to a picnic, wiping away the tears only when it did not interfere with his consumption of the next tasty little mollusk.

[2] *See* 30 U.S.C. §§ 1265(b)(3), 1265(d)(2), and 1265(e)(1) (Supp. II 1978); H. R. Rep. No. 493, 95th Cong., 1st Sess. 108–09; 112 (1977); H.R. Rep. No. 1445, 94th Cong., 1st Sess. 8, n.3 (1976).

[3] Up until now, the Board has not viewed itself to be so limited. *See Capitol Fuels, Inc.*, 2 IBSMA 261, 87 I.D. 430 (1980); *Wilkinson's, Inc.*, 1 IBSMA 1 (1978).

Tollage Creek. As part of a post-mining plan an access road was to be constructed when mining was completed. Engineering work was undertaken to determine the best way to construct a stable road. Utilization of a portion of the existing highwall was selected. The state mining authority approved this plan. The highwall is stable, all coal seams are (or will be) covered, and there is no toxic material or drainage.[4] In fact, approximately 90 percent of the road was constructed pursuant to provisions which exempted Tollage Creek from having to eliminate the highwall.[5] Eliminating the relatively small unexempted portion would not eliminate whatever danger OSM perceives. The cause of minimizing environmental degradation will not be served now by the action necessary to eliminate this highwall and the completion of the remainder of the roadway in a manner less stable than is proposed. Tollage Creek and Thompson are only to be unnecessarily penalized by this requirement.

What the Board should have done is either: (1) modify the decision below to eliminate any requirement to remove the highwall in question and affirm OSM's right to retain supervision over the maintenance of the remaining access road in accordance with the provisions of 30 CFR 715.17(*l*)(3); or (2) because of the apparent uncertainty, even on the part of OSM, as to the applicability of the highwall removal requirements to this situation, give prospective effect only to this decision and vacate the notice of violation.[6]

For these reasons I dissent from that portion of the decision requiring removal of the highwall.

MELVIN J. MIRKIN
Administrative Judge

BLACKWOOD FUEL CO., INC.

2 IBSMA 359

Decided *November 24, 1980*

Appeal by Blackwood Fuel Co., Inc., from that part of a Mar. 13, 1980, oral decision by Administrative Law Judge David Torbett, confirmed in writing on Mar. 31, 1980, sustaining two violations in Notice of Violation No. 80–II–

[4] Statements of fact in this dissent, unless otherwise indicated, are based on the findings set forth in the decision below at pages 2–4. Although the Chief Administrative Law Judge determined that "the highwall is stable and consists of sandstone [and that the] coal seams are completely covered and there is no toxic material or drainage" (Decision at 4), the majority has substituted ellipses for that finding (p. 573, *supra*) and made its own determination from the transcript that the coal seam had not yet been covered. Whichever conclusion is proper is immaterial to my opinion.

[5] From the record it appears that approximately 5,000 feet of the road that would ultimately provide access to Thompson's property is in place (Tr. 118–24, 143–49). Tollage Creek proposes to construct approximately 500 feet more of access road (Tr. 148–49).

[6] On its face, 30 CFR 715.17(*l*)(1) appears to provide authorization for the sort of road Tollage Creek proposes to leave in place for the benefit of the landowner. It is only in reconciling this provision with 30 CFR 710.5, 715.14, and 716.2(b) that the Board concludes that Tollage Creek's proposal is prohibited by the regulations. In short, the regulations are not without ambiguity in this regard (as OSM acknowledges in its Brief at 4–6, and as is suggested by the inspector's initial uncertainty, *see* Exh. A–5, as to existence or not of a violation).

15–1 and denying temporary relief (Docket No. NX 0–107–R).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally—Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

During the initial regulatory program a critical determinant of the jurisdiction of the Office of Surface Mining Reclamation and Enforcement over a surface coal mining operation conducted on lands within a state is whether the operation is subject to state regulation within the scope of any of the initial Federal performance standards.

2. Surface Mining Control and Reclamation Act of 1977: Applicability: Initial Regulatory Program—Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally

The Office of Surface Mining Reclamation and Enforcement has jurisdiction to enforce the initial Federal performance standards against a surface disturbance in Kentucky of less than 2 acres and the Federal 2-acre exemption set forth in 30 CFR 700.11(b) is not applicable where the disturbance is physically related to a surface coal mining operation under permit from the Commonwealth of Virginia, and where the disturbance is not a discrete operation but was undertaken in furtherance of the Virginia operation.

APPEARANCES: Daniel R. Bieger, Esq., Norton, Virginia, for Blackwood Fuel Co., Inc.; Chewanney Brown, Esq., Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Blackwood Fuel Co., Inc. (Blackwood), has appealed from that part of a Mar. 13, 1980, oral decision of Administrative Law Judge David Torbett, confirmed in writing on Mar. 31, 1980, sustaining violations 2 and 3 [1] of Notice of Violation No. 80–II–15–1. We affirm the decision.

Procedural Background

On several occasions during December 1979 and January 1980 employees of the Office of Surface Mining Reclamation and Enforcement (OSM) visited Blackwood's surface coal mining operation (Virginia permit 801) located on the Virginia-Kentucky border in Wise County, Virginia. On Jan. 14, 1980, OSM served Notice of Violation No. 80–II–15–1 on Blackwood charging it with three violations of the Surface Mining Control and Reclamation Act of 1977 (Act) [2] and the initial program regulations. All three of the alleged violations concerned an area in Kentucky immediately adjacent to the permitted area in Virginia.

[1] Violation 2 charged a violation of 30 CFR 716.2(a)(1) for placing spoil on the downslope. Violation 3 charged a failure to pass surface drainage through a sedimentation pond in violation of 30 CFR 715.17(a).

[2] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. II 1978).

Blackwood filed an application for review of the notice and an application for temporary relief. At the conclusion of the hearing held on Mar. 13, 1980, the Administrative Law Judge announced his decision from the bench vacating violation 1 and sustaining violations 2 and 3.[3]

On Mar. 24, 1980, Blackwood filed a "Petition for Review of Administrative Ruling" with the Board seeking review of that part of the decision sustaining violations 2 and 3 and requesting temporary relief. On Mar. 31, 1980, the Administrative Law Judge confirmed his oral decision in writing. By letter dated May 5, 1980, counsel for Blackwood informed the Board that its petition was intended as a request for temporary relief and as a request for review of the merits of decision. By order of the Board dated May 15, 1980, Blackwood's request for temporary relief was denied.[4] OSM and Blackwood subsequently filed briefs.

Factual Background

Blackwood's Virginia permit 801 covers over 700 acres (Tr. 14). A portion of the permit abuts the Virginia-Kentucky state line near Stonega Gap on Black's Mountain (Exh. R–1; Tr. 15, 16). Blackwood does no actual mining itself on the permit area; it is presently mined by two contract miners—Park Coal Co. (Park) and Rawhide Coal Co. (Tr. 18, 19). The mining in the area of Stonega Gap is being done by Park (Tr. 19). The three coal seams that are being contour mined in this area extend through the mountain and outcrop in both Virginia and Kentucky (Tr. 14, 27, 34). To facilitate its mining of the highest of these seams, the 13th seam, Park began mining that seam in Kentucky, disturbing approximately 1½ acres (Tr. 21, 30, 34). This disturbance in Kentucky was immediately adjacent to and connected with Virginia permit 801 and provided the only access to the 13th coal seam in Virginia (Exhs. R–2, R–3; Tr. 20, 29, 30). The disturbance in Kentucky consisted of a coal pit for the removal of the 13th seam, and the overburden materials which were cast downslope (Exhs. R–3, R–7; Tr. 21). The coal pit created in Kentucky continued uninterrupted onto permit 801 in Virginia (Exhs. R–2, R–3; Tr. 26, 27, 29, 46). No drainage control was provided for the area disturbed in Kentucky (Tr. 21). A cut-through or "window" had been made which allowed water that had accumulated in the pit to escape from the pit area and wash down the mountainside (Exhs. R–4, R–5, and R–6; Tr. 31, 32).

[3] By sustaining those violations the Administrative Law Judge implicitly denied Blackwood's request for temporary relief.

[4] In the same order the parties were granted the opportunity to file briefs on other questions raised in the petition "including what authority exists for the Office of Surface Mining Reclamation and Enforcement to regulate the activities of Blackwood (or its subcontractors) in the Commonwealth of Kentucky and whether those activities are regulatable under Kentucky law by that jurisdiction."

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At the time of the OSM inspection active mining operations were being conducted on the 13th seam in Virginia (Tr. 19). The bench created by the disturbances in Kentucky was being used to haul coal from, and gain access to, the 13th coal seam in Virginia (Tr. 20, 30). When the OSM inspector inquired as to the cause of the disturbance in Kentucky, he was informed by an employee of Blackwood that Park had disturbed the area to do remedial work on a haul road permitted in Kentucky to C & B Coal Co. (C & B) (Tr. 35).

The C & B haul road begins at Stonega Gap and roughly parallels the state boundary line on the Kentucky side of the mountain (Exh. R–1; Tr. 24, 25). The haul road was under permit to a 25- to 30-foot width all along its course in Kentucky (Tr. 39). The disturbance created by Park extended on both sides of the C & B haul road, and the coal seam removed by Park was approximately 20 feet below the surface of the haul road (Tr. 39, 40).

Discussion

[1] The Board has established that during the initial regulatory program a critical determinant of OSM's jurisdiction over a surface coal mining operation conducted on lands within a state is whether the operation is subject to state regulation within the scope of any of the initial Federal performance standards.[5] *James Moore*, 1 IBSMA 216, 221, 86 I.D. 369, 372 (1979); *Dennis R. Patrick*, 1 IBSMA 158, 86 I.D. 266 (1979). Both the Commonwealths of Virginia and Kentucky regulate surface mining within their respective boundaries. In fact, Kentucky regulates operations affecting 2 acres or less.[6] Appellant argues, however, that OSM has no jurisdiction to regulate the Kentucky disturbance because for operations of 2 acres or less Kentucky does not regulate spoil disposal or impose sedimentation pond requirements. Regardless of whether Kentucky regulates those particular activities on sites of 2 acres or less, it is clear that on such sites some aspects of surface mining activities within the scope of the initial Federal performance standards are subject to regulation by Kentucky. Therefore, OSM has jurisdiction to enforce all the initial Federal per-

[5] During the initial regulatory program OSM's authority to regulate surface coal mining operations is based on sec. 502(a) of the Act, 30 U.S.C. § 1252(a) (Supp. II 1978), which states: "No person shall open or develop any new or previously mined or abandoned site for surface coal mining operations on lands on which such operations are regulated by a State unless such person has obtained a permit from the State's regulatory authority." The regulations further provide: "(a) *Operations on lands on which such operations are regulated by a State.* (1) The requirements of the initial regulatory program do not apply to surface mining and reclamation operations which occur on lands within a State which does not regulate any part of such operations." 30 CFR 710.11(a)(1). In addition, 30 CFR 715.11(a) states: "(a) *Compliance.* All surface coal mining and reclamation operations conducted on lands where any element of the operations is regulated by a State shall comply with the initial performance standards of this Part according to the time schedule specified in § 710.11."

[6] KRS 350.060(10); KAR 405.1–040.

formance standards in Kentucky on such sites.

[2] Appellant also contends that the disturbance in Kentucky should be treated separately from the surface coal mining operation in Virginia and that OSM is without authority to regulate the Kentucky disturbance because it affects less than 2 acres. It argues that for that reason the Kentucky activity falls within the 2-acre exemption of the Act.[7]

The 2-acre exemption is set forth in 30 CFR 700.11 as follows:

> This Chapter applies to all coal exploration and surface coal mining and reclamation operations, except—
>
> * * * * *
>
> (b) The extraction of coal for commercial purposes where the surface coal mining and reclamation operation affects two acres or less, *but not any such operation conducted by a person who affects or intends to affect more than two acres at physically related sites* * * *. [Italics added.]

The exemption has no applicability to appellant's situation. The Kentucky disturbance was under 2 acres, but it was physically related to the Virginia operation.[8] It provided the only access to the 13th seam on the Virginia permit. The activity in Kentucky was performed by Park, the same company that was mining the Virginia permit. The Kentucky disturbance was not a discrete surface coal mining operation, but was undertaken in furtherance of the Virginia operation. OSM has jurisdiction over the Kentucky disturbance.

OSM presented evidence to establish a prima facie case for violation 2 and 3 of the notice and the Administrative Law Judge found that those two violations were sustained by the evidence. Appellant did not challenge the fact of these violations on appeal.

For the reasons stated above, that part of the decision appealed from is affirmed.

WILL A. IRWIN
Chief Administrative Judge

NEWTON FRISHBERG
Administrative Judge

ADMINISTRATIVE JUDGE MIRKIN DISSENTING:

The majority view is not without adequate foundation in the history of the Act. Congress found that surface disturbances from coal mining are national as well as local problems. 30 U.S.C. § 1201(c), (e), (j) (Supp. II 1978). One of the purposes of the Act was to establish a national program to protect the environment, 30 U.S.C. § 1202(a) (Supp. II 1978), and to "exercise the full reach of Federal constitutional powers to insure the protection of the public interest." 30 U.S.C. § 1202(m) (Supp. II 1978). 30 CFR 700.11 and its statutory analogue, 30 U.S.C. § 1278(2)

[7] Sec. 528(2) of the Act, 30 U.S.C. § 1278 (2) (Supp. II 1978), states: "The provisions of this chapter shall not apply to any of the following activities: * * * (2) the extraction of coal for commercial purposes where the surface mining operation affects two acres or less."

[8] The regulatory exemption makes no distinction for physically related sites separated by a state boundary line.

(Supp. II 1978), provide for an exemption for those who mine less than 2 acres. Exemptions are to be strictly construed. *Parrack v. Ford*, 68 Ariz. 205, 203 P.2d 872 (1949); *see Daniel Brothers Coal Co.*, 2 IBSMA 45, 87 I.D. 138 (1980). Moreover, the analysis of this exemption section of the Act by the Senate Committee on Interior and Insular Affairs, pending its enactment, was that it was for situations where mining would affect 2 acres or less because regulation of such a small operation would place too heavy a "burden on both the miner and the regulatory authority." S. Rep. No. 28, 94th Cong., 1st Sess. 223 (1975). Here, no undue burden is placed on either because the adjoining 700 acres is being regulated anyway. Nevertheless, I believe the Board should hold that the exemption applies.

While finding that surface mining is a national concern, Congress also found that the individual states were primarily responsible for regulating coal mining operations. 30 U.S.C. § 1201(f) (Supp. II 1978). That being so, I envision no environmental evil of sufficient magnitude to require OSM to cross state borders to establish the regulability of those situations where an operation of less than 2 acres being mined in one state is exempt from Federal regulations solely because of the intervening border, and not because of any actual separation of the operation from the larger, regulated one on the other side of the border. This is not to say that the smaller operation is not regulable by some other agency, state or Federal, but if a state is willing to serve as a 2-acre dumping ground for debris from a mining operation in another state, that peculiar manifestation of local pride or state sovereignty should not be of overriding concern to OSM—at least until such time as the Secretary, in terms, informs us that the border is not to provide a sanctuary.

I dissent.

MELVIN J. MIRKIN
Administrative Judge

RENFRO CONSTRUCTION CO., INC.

2 IBSMA 372

Decided *November 26, 1980*

Appeal by Renfro Construction Co., Inc., from the Apr. 22, 1980, decision of Administrative Law Judge David Torbett, Docket No. NX 0-43-R, upholding Notice of Violation No. 79-II-59-14, issued for appellant's alleged failure to comply with revegetation requirements set forth in 30 CFR 715.20.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Notice of Violation: Specificity

A notice of violation is reasonably specific, in accordance with 30 U.S.C. § 1271 (a)(5) (Supp. II 1978), when it is sufficient to guide the review and abatement processes without actual prejudice to the

recipient as the result of any ambiguity in the notice.

2. Surface Mining Control and Reclamation Act of 1977: Revegetation: Generally

A violation of 30 CFR 715.20(c) is proven when it is demonstrated that the temporary cover of small grains, grasses, or legumes seeded by an operator is inadequate to control erosion until a permanent cover is established, and that the operator has failed to take other measures to control erosion from the disturbed area.

APPEARANCES: David O. Smith, Esq., Corbin, Kentucky, for Renfro Construction Co., Inc.; Carol S. Nickle, Esq., Office of the Field Solicitor, Knoxville, Tennessee, Marianne O'Brien, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Renfro Construction Co., Inc. (Renfro), has appealed from the Apr. 22, 1980, decision of the Hearings Division upholding Notice of Violation (NOV) No. 79–II–59–14. The Office of Surface Mining Reclamation and Enforcement (OSM), acting pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act),[1] initially issued the NOV to Renfro for it's alleged failure to comply with 30 CFR 715.20 (a) (1). OSM subsequently modified the NOV to indicate that the provisions of the regulations violated by Renfro included 30 CFR 715.20 (c) and (d), and to require additional remedial action. In proceedings before the Hearings Division the NOV, so modified, was upheld. We affirm only the violation of 30 CFR 715.20(c) alleged by OSM.

Factual and Procedural Background

Renfro has conducted a surface coal mining and reclamation operation in Whitley County, Kentucky, under permit 7131–77. The coal extraction phase of this operation was completed during August 1979, and at the end of that month the company backfilled and seeded approximately 53 acres of disturbed area. Among the seeds planted were small grains, used in lieu of mulch to control erosion pending the development of a permanent vegetative cover. This action was taken by Renfro pursuant to its mining permit (Exh. R–18).

On Nov. 27, 1979, an authorized representative of OSM inspected Renfro's operation and issued NOV No. 79–II–59–14 (Exh. R–4), pursuant to sec. 521(a)(3) of the Act, 30 U.S.C. § 1271(a)(3) (Supp. II 1978). Renfro was charged with a "[f]ailure to establish on all disturbed areas a diverse, effective, and permanent cover of species native to the disturbed area," in violation of 30 CFR 715.20(a)(1).

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. II 1978).

The NOV applied to "[t]hat portion of the disturbed area where bare spots exist," [2] and Renfro was required to "[c]onduct a soil analysis on bare areas and [to] apply agricultural limestone in amounts specified by the analysis" by Dec. 18, 1979.

A follow-up inspection was conducted on Dec. 12, 1979. At this time the NOV was modified "to include [reference to] those areas on the more severe slopes where vegetation [had] failed to check erosion," [3] and to require Renfro to perform further soil analysis; to apply lime and fertilizer as indicated by that analysis; and to seed and mulch (in the amount of 3,000 pounds per acre) "those areas not covered with effective vegetation to establish a diverse, effective, and permanent vegetative cover of species native to the area" (Exh. R–14). The company was allowed until Mar. 13, 1980, to complete this action.[4]

The NOV was further modified on Feb. 15, 1980, to clarify that the provisions of the initial program regulations violated by Renfro included 30 CFR 715.20(c) and (d) (Exh. R–15). The reference to 30 CFR 715.20(a)(1) in the NOV was not deleted by this action.

On Mar. 17 1980, OSM modified the NOV (Exh. R–16) to eliminate the mulching requirement specified in the modification of Dec. 12, 1979; however, the violation of 30 CFR 715.20(d) (related to mulching) specified in the modification of Feb. 15, 1980, was not vacated. Also on Mar. 17, OSM terminated the NOV because the required remedial action had been taken (Exh. R–17).

Renfro initially applied to the Hearings Division for review of the NOV on Dec. 5, 1979. Subsequently, Renfro filed three amended applications.[5] A review hearing was conducted on Mar. 27, 1980, after which the Administrative Law Judge upheld the NOV, as modified, in a ruling from the bench confirmed in writing on Apr. 22, 1980.[6] Renfro

[2] These areas are shown in photographs introduced as Exhs. R–1, R–2, R–3, R–5, R–6, R–9, R–10, R–11, R–12, and R–13 (Tr. 12, 15–16).

[3] These areas are shown in photographs introduced as Exhs. R–7 and R–8 (Tr. 15–16).

[4] The issuing inspector explained at the review hearing that he thought it was to the advantage of Renfro for him to modify the original NOV rather than to terminate that and issue a new NOV to effect the purpose of the modification, and that 90 days were provided for the remedial action to be taken in order to allow Renfro to complete seeding after the winter months (Tr. 17).

[5] In its initial application and its first two amended applications, Renfro set forth claims related to the actions taken by the company to revegetate the area disturbed by its mining operation, the degree of success of its revegetation efforts, and the approval by the state regulatory authority of a variance from the mulching requirement set forth in 30 CFR 715.20(d). In its third amended application Renfro further claimed that the NOV was invalid because OSM had failed to comply with the requirements of 30 U.S.C. § 1271(a) (Supp. II 1978), and because OSM had issued a modification of the NOV (on Feb. 5, 1980) approximately 90 days after the original issuance of the NOV.

[6] A motion for summary decision based on the timing of OSM's answer to the original application for review was denied on Jan. 21, 1980. At the review hearing the Administrative Law Judge commented that his ruling had been based on a lack of showing of prejudice to Renfro by the timing of OSM's answer (Tr. 8). A second motion for summary decision, filed by Renfro on Mar. 18, 1980, was denied by the Administrative Law Judge by an oral ruling at the review hearing, on the grounds that there were material issues of fact unresolved by the pleadings (Tr. 8–9).

filed its notice of appeal from this decision on Apr. 28, 1980. Both parties filed briefs.

Discussion and Conclusion

Renfro first argues that OSM violated the requirement of sec. 521(a)(5) that a notice of violation shall "set forth with reasonable specificity the nature of the violation and the remedial action required, the period of time established for abatement, and a reasonable description of the portion of the surface coal mining and reclamation operation to which the notice * * * applies." 30 U.S.C. § 1271(a)(5) (Supp. II 1978). We do not agree. Although the NOV before us is not a model for the way NOV's should be written, it does not violate the statutory prescription.

[1] The basic purposes of an NOV are to inform the recipient of the nature and extent of circumstances at a surface coal mining and reclamation operation found to be in violation of OSM's regulatory standards, and to require certain action to eliminate those circumstances. The first purpose is served when the terms of the notice are sufficiently particular to guide the review process,[7] at least to the extent of informing the recipient sufficiently to facilitate (1) a reasoned determination whether the allegation should be contested and, if so, (2) preparation for such action.[8] When a course of abatement action is prescribed in terms clearly related to an alleged violation, the second purpose is served.[9] The greater OSM's precision in its composition of an NOV, the more likely it is that these criteria will be met; however, arguable ambiguities in the contents of an otherwise proper NOV do not invalidate OSM's enforcement action in the absence of a showing of actual prejudice to the recipient as a result of such ambiguities.[10]

In the record before us there is no evidence of such prejudice to Renfro attributable to the NOV under review. It appears that Renfro approached the review hearing fully prepared to defend its revegetation efforts and the results of those as being in accordance with the provisions of 30 CFR 715.20 referenced in the NOV, and OSM did not seek to introduce any evidence in support of a violation not described in the NOV. Furthermore, it is evident from OSM's termination of the NOV that the remedial requirements therein were comprehensible to Renfro.[11] Under these circumstances we conclude that the contents of the NOV were in accordance with sec. 521(a)(5) of the Act.

[7] *See, e.g., National Realty & Construction Co. v. OSHRC*, 489 F. 2d 1257, 1264 (D.C. Cir. 1973).

[8] *See Hardly Able Coal Co.*, 2 IBSMA, 332, 87 I.D. 557 (1980).

[9] Because the failure to abate an alleged violation may be the basis for further enforcement action by OSM, pursuant to 30 CFR 722.13, it is essential that the remedial action required by OSM be clearly communicated.

[10] *Compare Island Creek Coal Co.*, 2 IBSMA 125, 87 I.D. 304 (1980), *with Old Ben Coal Co.*, 2 IBSMA 38, 87 I.D. 119 (1980).

[11] OSM indicated its basis for termination of the NOV to be that "corrective measures have been taken" (Exh. R-17).

[2] We agree with the Administrative Law Judge that OSM proved a violation of the provisions of 30 CFR 715.20. Our affirmance of the decision below is premised, however, on the particular characterization of that violation which follows.

By its evidence OSM established that the vegetative cover resulting from Renfro's seeding operation in August 1979 was inadequate to control erosion in all of the permit area.[12] Under 30 CFR 715.20(c) it is required that disturbed areas must "be seeded with a temporary cover of small grains, grasses, or legumes *to control erosion until an adequate permanent cover is established.*" (Italics added.) Renfro need not have relied exclusively on vegetation for this purpose,[13] but having done so the company assumed the risk that its revegetation efforts might be inadequate to avoid significant erosion. The record evidence demonstrates that this eventuality was realized; thus a violation of 30 CFR 715.20(c) was proven.

OSM also referred to 30 CFR 715.20(a)(1) in its description of the alleged violation. In that subsection it is required that "[t]he permittee shall establish on all land that has been disturbed, a diverse, effective, and permanent vegetative cover of species native to the area of disturbed land or species that will support the planned postmining uses of the land approved." The inspector who issued the NOV testified at the review hearing to the effect that the time between Renfro's initial seeding of its disturbed area and his inspections of that area was inadequate for a permanent vegetative cover to have become established.[14] This testimony was not contradicted by other evidence; therefore, we do not consider 30 CFR 715.20(a)(1) to be an element of the violation proven by OSM.

For the foregoing reasons the decision below is modified, to delete 30 CFR 715.20(a)(1) and (d) as elements of the description of the violation in Notice of Violation No. 79-II-59-14, and affirmed.

MELVIN J. MIRKIN
Administrative Judge

NEWTON FRISHBERG
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

[12] Tr. 11-12, 15-17, 114; Exhs. R-1, R-2, R-5, R-6, R-7, R-8, R-9, and R-11 (photographs of the disturbed area taken during OSM's inspections).

[13] As a general rule mulch must be used, in addition to temporary species, to control erosion. 30 CFR 715.20(d). Renfro was granted a variance from this obligation by the regulatory authority (Exh. R-18). Because of this variance, subsec. 715.20(d) is not an element of the violation affirmed by our decision. We note, however, that the variance was conditioned as follows: "If the small grains do not provide adequate stability for the soil, an appropriate mulch is to be used." Moreover, even apart from this condition, the variance granted Renfro could not serve to relieve the company of its performance obligation under 30 CFR 715.20(c) to control erosion in the disturbed area.

[14] Tr. 21.

MARIETTA COAL CO.

2 IBSMA 382

Decided *November 26, 1980*

Appeal by the Office of Surface Mining Reclamation and Enforcement from the Mar. 21, 1980, decision of Chief Administrative Law Judge L. K. Luoma, Docket No. IN 0-12-R, vacating Notice of Violation No. 80-3-17-3 which was issued to Marietta Coal Co. for conducting surface coal mining operations within 100 feet of a cemetery, in violation of sec. 522(e)(5) of the Surface Mining Control and Reclamation Act of 1977.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

A prima facie case for the existence of a human burial ground can be established by evidence that stones at the purported site of the burial ground bear inscriptions generally associated with gravemarkers, combined with evidence that the site is described as a "cemetery" in a coal lease pertinent to land that includes the site.

2. Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Cemetery." **The term cemetery as it is used in sec. 522(e)(5) of the Act, 30 U.S.C. § 1272(e)(5) (Supp. II 1978), may include a private burial ground.**

APPEARANCES: John C. McDowell, Esq., Field Solicitor, and Myra P. Spicker, Esq., Office of the Field Solicitor, Indianapolis, Indiana, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; Neal S. Tostenson, Esq., Cambridge, Ohio, for Marietta Coal Co.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

This appeal was brought by the Office of Surface Mining Reclamation and Enforcement (OSM) from the Mar. 21, 1980, decision of the Hearings Division vacating Notice of Violation (NOV) No. 80-3-17-3. The NOV was issued to Marietta Coal Co. (Marietta) as the result of OSM's determination that the company was conducting surface coal mining operations within 100 feet of a cemetery, in violation of sec. 522(e)(5) of the Surface Mining Control and Reclamation Act of 1977 (Act).[1]

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[1] Act, of Aug. 3, 1977, 91 Stat. 445, 507, 30 U.S.C. § 1272(e)(5) (Supp. II 1978). Sec. 522(e)(5) provides:

"(e) After the enactment of this Act and subject to valid existing rights no surface coal mining operations except those which exist on the date of enactment of this Act shall be permitted—

* * * * *

"(5) within * * * one hundred feet of a cemetery."

There has been no assertion by Marietta that the subject surface coal mining operation was in existence on the date of enactment of the Act or that the company enjoys any "valid existing rights" with respect to its operation.

Factual and Procedural Background

Marietta conducts a surface coal mining and reclamation operation in Belmont County, Ohio, under Ohio Permit No. C–1102, on land owned by Nancy Phillips. The lease between Marietta and Phillips contains the provision: "Lessee will not disturb the existing cemetery consisting of three or four graves on said property. Lessee shall construct a wire fence around the cemetery during mining operations" (Exh. 6).[2]

On Jan. 8, 1980, an OSM inspector visited Marietta's operation for a routine inspection. On the site he observed a fenced area within which there were four prominent stones. Three stones were roughly in alignment, approximately 6 feet apart. On one of the three were discernible the letters "A.D." followed by the number "1815." On another there appeared to be the letters "N.D.," "A," and the number "07" possibly preceded by an "8." Mining activity was being conducted within 100 feet of these stones along a highwall.

The OSM inspector returned to Marietta's operation on Jan. 9, 1980, and issued Notice of Violation No. 80–3–17–3. A single violation was described: "Operator has affected area within 100′ of a cemetery" (Exh. 7). Marietta sought review of the NOV and a hearing was held on Feb. 29, 1980. Testimony during the hearing established the circumstances of OSM's inspection, related above, and otherwise was focused on the factual issue whether the fenced area is a human burial ground. In this regard, the Chief Administrative Law Judge found from the testimony:

> The owner of the land had been told by her father that bodies were buried in a certain portion of the field. As a result her father never plowed that portion of the field and out of deference to her father's wishes she never allowed that portion of the field to be disturbed. * * *
>
> In accordance with the lease, applicant erected a fence around the area in question. The property deed which was attached to the lease [Exh. 6] contained no reservation or mention of any reservation of any ground for cemetery purposes. There were no records in the township registry of a cemetery on the property. The property has not been set off except for the fence placed by [Marietta] and there were no indications that there had been any maintenance of the stones or the property around them.
>
> * * * * *
>
> Although there is no [direct] proof that bodies are buried in the area in question, based upon the assertions of the owner of the land, I find that the area is a private burial site.

Decision at 3–4. After relating his findings, the Chief Administrative Law Judge concluded that "the site is not a cemetery as contemplated by the Act." *Id.* at 4. Accordingly, the NOV was vacated.

Discussion and Conclusions

[1] The record evidence supports the determination that the fenced area within Marietta's operation is

[2] All exhibits referenced in this opinion were introduced by OSM.

a private burial ground. OSM's testimony and photographic evidence concerning the spatial relationship between certain stones on the site (Tr. 18; Exhs. 1 and 2) and the inscriptions found on two of those stones (Tr. 17–18, 30–32; Exh. 3), combined with the reference to the area as a "cemetery" in the lease between Marietta and the landowner (Exh. 6), established a prima facie case of the existence of a burial ground.[3] Marietta's evidence that the stones might be foundation stones rather than gravemarkers (Tr. 92–93), that the site is not identified as a burial ground in local public records (Tr. 74–75), and that there is no explicit reference to a burial ground in the last recorded conveyance of title to the property (Exh. 6) merely suggests a different conclusion. It is not sufficient to overcome OSM's prima facie case.[4]

From the evidence as a whole, the stones described by OSM appear more likely than not to be gravemarkers. The fact that one witness had not found reference to a cemetery on the property in local, public records is not dispositive of whether a burial ground exists there, particularly because the same witness testified (Tr. 65) that not all cemeteries in Belmont County, Ohio, are identified in county records. Nor is the fact that there is not explicit reference to a burial ground in the latest deed conclusive evidence that such does not exist on the property. The lack of reservation of an easement related to a burial ground in the last conveyance of title to the property does not preclude the existence of a burial ground there.

[2] From our conclusion that a human burial ground is located within the area of Marietta's surface coal mining and reclamation operation, it follows that this site is a "cemetery" within the meaning of sec. 522(e)(5) of the Act. Although the departmental definition of "cemetery" to mean "any area of land where human bodies are interred," 30 CFR 761.5, was not applicable at the time of the violation,[5] the meaning associated with the term "cemetery" under state law, generally,[6] and Ohio law, particularly,[7] is consistent with the use of the same or similar definition in this case. Such a definition may fairly be said to embrace a private burial ground, including one in

[3] A prima facie case is made when sufficient evidence is presented to establish essential facts which, if uncontradicted, will permit if not compel a finding. *Burgess Mining and Construction Corp.*, 1 IBSMA 293, 298–99, 86 I.D. 656, 658–59 (1979); *James Moore*, 1 IBSMA 216, 223, 86 I.D. 369, 373 (1979).

[4] The ultimate burden of persuasion in a proceeding to review a notice of violation issued pursuant to sec. 521(a)(3) of the Act, 30 U.S.C. § 1271(a)(3) (Supp. II 1978), lies with the applicant for review. 43 CFR 4.1171.

[5] This definition did not become applicable to the initial regulatory program until Jan. 30, 1980 (44 FR 77440, Dec. 31, 1979), which was after OSM's issuance of the NOV to Marietta (Exh. 7).

[6] *See* 75 A.L.R. 2d 591–2 (1961) (and cases cited therein); 14 C.J.S. *Cemeteries* § 1 (1980) (and cases cited therein).

[7] *See, e.g.*, Ohio Rev. Code Ann. § 1721.21 (A)(2)(a) (Page).

which burials have not occurred for an extensive period of time.[8]

For the foregoing reasons, the decision below vacating Notice of Violation No. 80–3–17–3 is reversed.

MELVIN J. MIRKIN
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

ADMINISTRATIVE JUDGE FRISHBERG DISSENTING:

I would affirm the decision below. As stated by Judge Luoma:

> **The site has not been used since the early nineteenth century and has not been maintained. In effect, the site has not been "set apart" either by a municipal authority or by any sort of private enterprise. No one visits the site and no future intermemts [*sic*] are planned there. The area has never been designated by deed reservation nor had there been any other act of conveyance to a public authority, or a cemetery association, to show that there was ever any intent to create a cemetery.**

(Decision at 4). Not only does no one visit the site, but apparently no one has survived or knows of anyone who might have been buried there. When the lease with Marietta was executed, lessor had, and still has, the right to remove the stones and disinter whatever remains might still exist.

Thus, even if the four stones evidenced a private burial ground in the past, it has long since been abandoned in fact.[1] While abandonment usually requires overt evidence, such as the disinterment of bodies and the removal of gravemarkers, it is ultimately a question of intent.[2] Regarding a private burial ground, it is the intent of the heirs or survivors of those creating the burial ground or those buried therein which controls.[3] Since none apparently exist, there is no one who has standing to enjoin the removal of the stones and remains, if any, by lessor, if she chooses to do so.[4] Accordingly, the burial ground has been abandoned.

By adhering to her father's wishes and agreeing to her wishes, lessor and Marietta, respectively, made a voluntary decision to forfeit gain. To penalize them further under the circumstances lends credence to the old saw, "no good deed goes unpunished." I do not believe Congress intended "cemetery" to be so interpreted.

NEWTON FRISHBERG
Administrative Judge

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[8] This is not to say that any casual or surreptitious deposit of a human body will constitute a cemetery; nor do we say that cemeteries cannot be abandoned. We do say that no such exception has been shown here.

[1] *See* cases collected at 14 Am. Jur. 2d, *Cemeteries* § 21 and Annot.; 75 A.L.R.2d 591, 598–99 (1961).

[2] *Id.*

[3] *See Heiligman* v. *Chambers*, 338 P.2d 144 (Okla. 1959).

[4] That lessor's father was concerned lest the dead, if any, be disturbed would not give him standing. *See Heiligman* v. *Chambers*, *supra*, n.3.

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